MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 34 | Issue 3 Article 5

2008

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THE CREATION OF THE FIRST AMENDMENT RIGHT TO FREE EXPRESSION: FROM THE EIGHTEENTH CENTURY TO THE MID-TWENTIETH CENTURY

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The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.

Justice Anthony M. Kennedy (2000)[1]

Justice Robert H. Jackson posited in 1943 that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[2] In the same opinion, which ended compulsory flag salutes in public schools, Justice

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1. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826 (2000).
2. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

Jackson premised his reasoning on what he called a "trite but necessary" lesson about the relationship between the First Amendment and democratic rule in America: "Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . Authority here is to be controlled by public opinion, not public opinion by authority."[3] Nearly a half century later, Justice William J. Brennan proclaimed while upholding the right to burn the American flag in protest, that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[4]

Repudiation of governmentally-mandated orthodoxy and tolerance for unpopular speech are two sides of the guiding principle in modern free speech law. "The essence of that rule," Justice John Paul Stevens wrote for the Supreme Court, is that "regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."[5] Government neutrality is the norm in regulating speech.

These concepts are indispensable components of the libertarian vision of the First Amendment that was only beginning to be recognized by the Supreme Court when Justice Jackson spotted the fixed star in 1943.[6] For well over 100 years after the Bill of Rights was passed, the Court had not once acted to protect First Amendment rights. In large measure, this was because the Justices did not recognize that the states were bound by the amendment until 1925.[7] Even when they did, a majority of the Court demonstrated almost unrelenting hostility toward the speech and press rights of political dissidents.[8] A similar wave of repression appeared in the Cold War period of the 1950s, countenanced again by most of the Court.[9] But notwithstanding the setback for free expression that the 1950s witnessed, the Court had decidedly turned a corner toward the modern libertarian approach to free expression.[10] Decisions handed down over a decade starting with

3. *Id.* at 641.
4. Texas v. Johnson, 491 U.S. 397, 414 (1989).
5. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 67 (1976).
6. *Barnette*, 319 U.S. at 642.
7. *See* Gitlow v. New York, 268 U.S. 652, 654 (1925).
8. *See id.*
9. Konigsberg v. State Bar of Cal., 366 U.S. 36, 78–79 (1961).
10. *Barnette*, 319 U.S. at 646.

the late 1930s provided the theoretical foundation for today's more fully realized First Amendment. Fundamental tenets of free speech were overturned in short order and the Court reinforced the traditional hostility to prior restraints.[11] Justice Jackson's decision in the 1943 case, *West Virginia State Board of Education v. Barnette*, overruled a case only three years old reaching the opposite result.[12]

It is fitting, then, to start this study with a rude reminder: Justice Jackson's and Justice Brennan's defense of autonomous individualism against statist conformity represents the modern First Amendment, not its past incarnations. Today, in contrast to the first three decades of the last century, the Court—including its most conservative members, who at times lead the charge—has time and again shielded speakers and writers from suppression of their opinions. How this seismic shift in the Court's attitude took place is the story that will be told in these pages. The thesis is that by the end of the 1960s the Court had enunciated the essential principles of the modern First Amendment, albeit with some significant exceptions. Those exceptions involved commercial speech and sexually-explicit expression, holdovers from a more repressive era. Even in those areas, however, the seeds of current doctrines were sowed well before the Court recognized that these forms of speech were entitled to substantial protection from government interference.

As with other constitutional subjects, there are two basic ways to inform an understanding of free expression as a fundamental value to Americans. One avenue is to research the origins of the First Amendment in an attempt to discover why it was included in the Bill of Rights. Another approach seeks to elucidate the theory of free expression as it has been revealed through decades of experience in a myriad of settings. Neither is entirely satisfactory. The first, relying on the expectations of those who created the First Amendment, runs into the reality that legal protections for speech and press at the time the First Amendment was written were vastly less libertarian than modern judicial interpretations. Looking to developments in the interim reveals a mottled pattern of suppression and protection.

In taking the second path, one must study not just legal doctrines, but also social and political history, to discern the

11. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 589 (1976).
12. 319 U.S. at 642.

principles behind the epoch's attitude toward free expression. Legal history is not just an assembly of seriatim decisions. Rulings are based on theories from which the governing principles of the subject in question are deduced. Free expression is no different. Along the way toward the more libertarian outlook of modern American free expression doctrines, the Court, the academy, and the public have attempted to develop grand theories to define the purposes of the First Amendment (or some portion of it). Few subjects of constitutional law have been accompanied by such a cacophony of competing justificatory theories as freedom of speech and press.

Here is a brief and incomplete sample of proposed as well as judicially-adopted theories for protecting free expression: unbridled speech allows the truth to prevail in the marketplace of ideas;[13] it oils the wheels of democracy by providing citizens the knowledge with which to govern themselves;[14] free expression thus checks against government abuse and provides a mechanism that fosters "rational judgment" instead of social upheaval;[15] free speech serves the indispensable end of developing self-restraint in society—to which can be appended the idea that allowing dissent releases pressure that otherwise would explode into antisocial behavior.[16] Still others see speech as part of a larger system of natural rights, which regards free expression as being vital to fostering personal autonomy and self-determination.[17] Facilitating the formation of political opinions may be fundamental to the democratic process, this view goes, but by itself it presents a crabbed conception of what justifies freedom to expression. Among other types of expression protected by the First Amendment, they would include artistic endeavors, such as literary works and art pieces, which at best have an attenuated connection to politics. Another perspective holds that freedom of expression exists to give voice to the dissenter, whose views may ultimately win

13. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

14. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

15. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970).

16. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

17. *Id.*

majority acceptance.[18] Allowing free rein to critics of the status quo thus provides a counterweight to political and social petrifaction. The right to dissent also has roots in the constitutional values of individualism and self-autonomy. Dissenters are exercising a fundamental right, so what they say need not improve the general society. Indeed, it may be socially worthless in the minds of almost everyone except the speaker. From these premises, it is a short stretch for some to posit that the First Amendment, taken in all its parts, stands as a manifesto for individual distinctiveness, creativity and nonconformity with mainstream values.[19]

Not everyone is so inclusive in elaborating the values served by the First Amendment. Many agree with the sentiments of Robert Bork, who famously wrote that "the first amendment must be cut off when it reaches the outer limits of political speech."[20] One need not go as far as Bork to agree that the Court in the modern era has shown special solicitude toward political advocacy. Speaking of limitations on political financing, Justice Clarence Thomas wrote in dissent, joined by Justices Antonin Scalia and Anthony M. Kennedy: "Political speech is the primary object of First Amendment protection."[21]

None of these theories provides a complete account of what the First Amendment has represented to the American people over the course of the nation's history, or even in today's world. None is adequate to explain all of the currently recognized doctrines of free speech that have emanated from the Court. The justifications overlap, reinforce one another, and sometimes clash. Without a unified theory, a typical recourse has been to acknowledge that the philosophy of free expression is nourished by multiple springs, the better "to protect a rich variety of expressional modes."[22] That is fine as rhetorical flourish, and fits nicely with post-modernist attitudes, but it leaves open the decisive question of why a

18. *See generally* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).

19. *See generally* DAVID A. J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY (1999); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

20. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27 (1971).

21. Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001) (Thomas, J., dissenting) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting)).

22. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 789 (2d ed. 1988).

particular "expressional mode" should be entitled to protection.[23] Without a theory, how is one to tell? As we shall see, historical practices at the time the First Amendment was formulated are a poor guide to explaining the present, much less the intervening years. Certainly the values prevalent in late eighteenth century American society about free expression do not track current conceptions either on or off the Court.[24] Within the last hundred years, the Court's decisions on speech and press have—broadly speaking—swung from tolerance of state repression toward a more libertarian conception that protects an enormous range of communications. There are sharply opposing views as to whether the Court has gone far enough in guarding expression or, on the contrary, too far.

All applications of free expression involve tradeoffs between the social utility of restricting expression and the corresponding burdens on the individual and society from allowing it. As with any question of weighing societal values versus individual autonomy, an assessment depends on one's philosophical starting premise about the goals served (or preferred) by freedom of expression. A person who is a utilitarian by outlook, for example, might find the abridgment of speech for some to be an acceptable tradeoff for the benefit of all. One who favors maximum individual autonomy may accept an immediate social harm from free discourse as worth the price in order to maximize personal freedom in the long run. On the other hand, if one thinks that the state has been assigned the constitutional role of closely overseeing the lives of citizens to assure obedience to social norms, state impositions on expression may seem normal and even welcome. Some contend that the supreme value of the First Amendment is to expose the truth, on the ground that the truth alone will set us free. The "marketplace of ideas," alluded to above, is often the accompanying metaphor to capture this theory: by the clash of ideas, we ultimately find what is true (or at least approximates the truth better than in a closed society). Others reject this entire line of reasoning as beside the point even if correct. Neither discovering "truth" nor securing the greatest good for the greatest number should guide the inquiry into First Amendment protections, according to this conception.

23. *Id.*

24. *See* Edward J. Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372, 381–85 (1981).

Instead, our eyes should be focused on the premise of personal autonomy that they see as underpinning the First Amendment. On this view, free speech is the norm and restrictions on it by government need the most persuasive of justifications.

A new wave of critics emerging in recent decades has turned these arguments on their head. According to various theories, mostly propounded by self-identified leftists, governmental neutrality toward the content of speech is in fact not neutral in result.[25] The "marketplace of ideas" is not a free market, they posit, because the exchange is biased toward the wealthy and powerful, as well as sexists, bigots and perverts.[26] A select minority of society enjoys privileged access to the arenas in which opinions matter.[27] Leftist proponents of free expression may agree with conservatives on the Court that safeguarding political speech is the preeminent mission of the First Amendment.[28] They disagree when it comes to such issues as controls on election campaign contributions and expenditures.[29] The conservative version of this proposition usually opposes restraints on campaign financing.[30] Their critics are typically "liberals" in the modern sense of leftist, Senator John McCain notwithstanding. Liberals commonly argue that limitations on campaign contributions and spending are necessary to correct the imbalance of power created by inequalities of wealth, especially corporate wealth.[31] Libertarians reply that spending money on a campaign is the equivalent of personal expression.[32] Another side of this critique highlights the negative ramifications of official neutrality: it permits attitudes or encourages actions that should have no place in a society committed to equality and safeguarding the welfare of the populace. Pornography, one line of argument goes, must be available as part of the "marketplace," notwithstanding that it may reinforce sexism and lead to subjugation and rape of women by men. Racist or sexist speech does directly injure victims within earshot and indirectly creates a climate of

25. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting).

26. *See generally* Paul H. Brietzke, *How and Why the Market Place of Ideas Fails,* 31 VAL. U. L. REV. 951 (1997).

27. Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 160–62 (2003).

28. *Id.* at 161.

29. *Id.* at 161–62.

30. *Id.* at 162.

31. *Id.*

32. *Id.* at 162–63.

discrimination. Cigarette ads promote a deadly product. And so on, as it is easy to list the downsides of unbridled expression. Perhaps paradoxically, while these types of arguments usually have come from the political left, on occasion (as with pornography) there is an overlap with proponents of traditional values.

One might study this subject by exploring every major theory (and their corresponding philosophical roots) that has been put forth to justify resolution of First Amendment disputes. Even if one does so systematically, a sobering realization will emerge from the inquiry: *every theory that has been proposed is inadequate*, either as an organizing principle for a coherent conception of free expression or as a prescription for rethinking the field. Obviously, much the same can be said about most areas of constitutional law. Taking that point, there is something acutely unsettling about the indeterminacy of the First Amendment. Among all the stars in the constitutional constellation, none is more luminescent than freedom of expression.[33] It is the foundation of democratic government, the very essence of what it means to be free in the political sense. A sure gauge of authoritarian governments is their suppression of expression, and not just that which is political in nature. So it is disconcerting to lay all of the Supreme Court's many decisions on speech and press end to end, only to find that a coherent, unifying rationale for them always seems beyond grasp.

For purposes of this study, the light will shine on the values historically served by protecting various kinds of speech. From that inquiry, one can at least understand why the chips fell where they did in First Amendment cases. There is a heuristic and normative purpose to this exercise as well. The knowledge will show why governmental controls on speech deserve everlasting scrutiny. Giving government power over the content of what may be said grants censorial power to officials, and historically that authority has been abused in ways intolerable to the American people. Dissidents, who may be saintly or despicable, are the unintended beneficiaries of tolerance for all ideas. Courts protect dissenters of all stripes under an official regime of neutrality toward content in order to avoid giving arbitrary power to government officials. "We have above all else feared the political censor," Justice Douglas wrote.[34] American courts, in other words, have not protected

33. Cohen v. California, 403 U.S. 15, 24 (1971).

34. Dennis v. United States, 341 U.S. 494, 585 (1951) (Douglas, J., dissenting).

speech rights because there is necessarily some intrinsic importance in the ideas espoused by Wobblies, Nazis, or Communists, none of whom could be accused of moderation. This does not mean that dissenters never contribute ideas that have mainstream influence or induce other people to reconsider their own thoughts. They may—and have in abundance—but the point of protecting them is to safeguard everyone from the common enemy: ourselves.[35]

Another way to explain the values behind the First Amendment is to connect the principles of governmental neutrality to those underpinning equal protection. Since speech is a fundamental right, government regulation of content must treat speakers equally. There must be a legitimate reason for the content distinction drawn by the regulation, one weighty enough to outweigh the strong presumption against content controls. Inevitably this requires a value judgment on the part of judges as to which interests are legitimate and how much weight they should be given. Consider the opening quotations from Justices Jackson and Brennan: the Court has made the key value judgment that official disagreement with or dislike of—or revulsion against—the speaker's message is not a legitimate reason to restrain or punish a person. Not only was this principle not recognized in the eighteenth century, it had changed little by the beginning of the last century. Heaps of laws were on the books, and enforced, against an assortment of messages that legislatures disfavored. Pornography is an obvious case, but there were countless others, from bans on speech impugning a woman's reputation to laws that essentially made vigorous criticism of a war the basis for serious criminal sanctions.[36]

Over time, American courts have steadily reduced the number of legitimate reasons for limiting the content of speech or association. At the federal level, this process did not get underway until the 1930s and 1940s.[37] By the end of the 1940s, the interpretation of the First Amendment bore little resemblance to that of the start of the century, and less so to when the amendment was written.[38] Since that time there have been numerous

35. The "enemy is ourselves" notion comes from the renowned philosopher, Pogo, the comic-strip character created by Walt Kelly.

36. *Dennis*, 341 U.S. at 508.

37. *Id.* at 508–16.

38. *Id.* at 577.

developments in First Amendment law. Nevertheless, by the end of 1950s the essential transformation in the judiciary's attitude toward free expression was complete in that the courts had declared the right to speak and write at will to be indispensable elements of American society.[39] All important subsequent developments in the First Amendment have flowed from these principles.

Condoning the public airing of disparate beliefs does encourage change, but in a democratic society the change is likely to be rather more moderate than precipitous and far-reaching. Moderation, at least in governmental policies, is the natural consequence of critics publicly nipping away at the state's actions, usually from several political outlooks that temper resorting to extremes. That may not seem apparent when the focus is on the differing ideologies of America's political parties, which seem radically different until compared to closed societies such as the former Soviet Union or any number of contemporary nations, including many of our so-called allies. The relevant picture is not the present, then, but the perspective of long spans of history and international practice. Charles A. Kupchan, an international affairs specialist at Georgetown University, provides a globalist perspective about the linkage between free speech and moderate, stable governments. The pragmatic function of the First Amendment in modern American society, he has written, derives from "the tendency for democratic debate to produce centrist and moderate policies."[40] This may not be a glamorous aspiration, but consider some of the alternatives that history has served up. Unbridled speech, however moderating to society it may be, is neither a panacea that guarantees democracy nor a cost-free libertarian lunch. People get hurt by speech, sometimes very badly. Justice John Marshall Harlan acknowledged this downside of the Court's insistence on neutrality when he wrote in 1971: "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."[41] Moderation and political stability may have been the healthful results of the tonic, but along with them came neo-Nazis parading through towns populated by Holocaust survivors, militantly pro-Jihad websites, ultra-violent movies, and a multi-billion dollar porn market. Add your own tirade here—and prepare for a long story.

39. *Id.* at 531.
40. CHARLES A. KUPCHAN, THE END OF THE AMERICAN ERA 113 (2002).
41. Cohen v. California, 405 U.S. 15, 24 (1971).

I. FREEDOM OF EXPRESSION IN THE EIGHTEENTH CENTURY

Comparing the current body of First Amendment law, there is a radical difference in outlook regarding freedom of expression between the eighteenth and the late twentieth and early twenty-first centuries. America's legal tradition, derived from English practice, was not generous toward the rights of speakers and printers, especially not if their words were critical of the government or its officials.[42] Blackstone summarized the prevailing dogma in English law about the freedom to publish:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[43]

Among the varieties of speech that were liable to subsequent punishment, Blackstone included speech that was "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels."[44] His delineation of "no previous restraints" referred to the demise in 1694 of Great Britain's notorious licensing system for the press.[45] Under English law prevailing at the time Blackstone wrote, disparagement of government or officials could be prosecuted as sedition.[46] Truth could not be offered as a defense to a charge of sedition or criminal libel—a factually accurate rebuke of authority was considered worse than a false accusation because it was even more likely to erode the confidence of the people in their government.[47] Juries in seditious libel cases were instructed by English judges to determine only whether the defendant in fact published the writing—whether the printing amounted to sedition

42. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND *150-52 (emphasis in original).
43. *Id.* at 151–52.
44. *Id.* at 151.
45. *Id.*
46. *Id.*
47. *See* 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 194 (1716) ("[T]he greater Appearance there is of Truth in any malicious Invective, so much the more provoking it is.").

was a judicial question to be ascertained only by judges.[48] Libel was a criminal offense in almost all the founding states, and seditious utterances were regarded as a form of libel.[49] Every state at the time the First Amendment was adopted outlawed either blasphemy or profanity.[50] Publishing the sort of sexually-explicit depictions that are now routine in films and magazines would have been criminal acts in 1791 had photography been invented. More generally, speech that had "a bad tendency" to cause crime, disorders or immoral acts could be punished.[51] Blackstone explained that libels were punishable because they had "an immoral or illegal tendency."[52] Penalizing publications "of a pernicious tendency," he declared, was "necessary for the preservation of peace and good order, of government and religion, the only solid foundation of civil liberty."[53] As one legal scholar summarized, "[t]he colonial press had no legal protection in 1774 other than the common law prohibition against prior restraints."[54]

This description represents the law of free speech in the late eighteenth century as authoritatively represented in opinions and treatises. But the actual practice of the American people reveals a society in which people certainly valued—and took for granted—the ability to read the news and opinion of others, as well as speak their minds on most subjects. This was particularly true in the American colonies, where the people were far removed from the distant center of imperial power. A declaration by the Continental Congress in 1774 extolled the free press not only for its

48. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 10 (2000) [hereinafter CURTIS, FREE SPEECH]; RICHARD LABUNSKI, LIBEL AND THE FIRST AMENDMENT: LEGAL HISTORY AND PRACTICE IN PRINT AND BROADCASTING 34 (1987); CLIFTON O. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS: THE EVOLVING LAW OF LIBEL 266 (1971).

49. David J. Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence,* 45 AM. J. LEGAL HISTORY 154, 171 (2001).

50. *See* Roth v. United States, 354 U.S. 476, 482 n.12 (1957) (listing state statutes prohibiting blasphemy or profanity circa 1792); 3 Pa. Laws 177, 178 (1791–1802); LEONARD W. LEVY, TREASON AGAINST GOD: A HISTORY OF THE OFFENSE OF BLASPHEMY (1981); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 305–319 (1988) (explaining that in 1988 blasphemy was a capital offense in three states: New York, Connecticut. and Massachusetts).

51. CURTIS, FREE SPEECH, *supra* note 48, at 10.

52. BLACKSTONE, *supra* note 42, at *150.

53. *Id.* at *152.

54. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 464 (1983).

"advancement of truth, science, morality, and arts in general," but more importantly for "its diffusion of liberal sentiments on the administration of Government."[55] A free press, Congress asserted, facilitated the "ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."[56] When the Revolution was over, the habit of rebuking the establishment did not perish. By the early 1790s, opponents of the Federalist administrations of Washington and Adams lambasted officialdom in print with all manner of invectives.[57]

What existed in the eighteenth century, then, was a disconnection between the existing legal order, which could be highly repressive, and the impassioned and oftentimes irreverent outpouring of revolutionary and opposition literature, much of which went way over the line of what the law counted as seditious libel. As legal history goes, this is not so unusual: often there is a chasm between law as officially stated and as actually applied. At least in the arena of political speech, American popular attitudes regarding speech freedoms dovetailed with the larger development of disenchantment toward English rule. Once there was consensus that government ruled in the interest of and at the sufferance of the people, it followed that the people must be heard, and thus free speech was "the great Bulwark of liberty; they prosper and die together."[58] So stated *Cato's Letters*, by the English opposition writers John Trenchard and William Gordon, whose essays were widely reprinted and admired among Americans.[59] Colonial and revolutionary legislatures copied the term "Bulwark of Liberty" to describe freedom of press and speech.[60] When, in 1768, the Massachusetts assembly was asked by the governor to refer a newspaper publisher to a grand jury for seditious libel, the House refused,

55. CONTINENTAL CONGRESS, ADDRESS TO THE INHABITANTS OF QUEBEC (1774), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 222 (Bernard Schwartz ed., 1971) [hereinafter DOC. HIST. BILL OF RIGHTS].

56. *Id.*

57. *See generally* DONALD H. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD (1969).

58. 1 JOHN TRENCHARD & WILLIAM GORDON, CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS 99 (1724), *quoted in* JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 25 (1988) [hereinafter SMITH, PRESS].

59. *Id.*

60. *Id.*

declaring: "The Liberty of the Press is a great Bulwark of the Liberty of the People: It is therefore the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it."[61] In a further insult to the governor, who had been the object of the newspaper story, the grand jury refused to issue an indictment.[62]

By the dawn of the revolutionary upheaval in America, even Lord North's administration mouthed the idea of the press as a "bulwark" of freedom, though he drew the line at "licentiousness."[63] But it was one thing to countenance the scores of newspapers in London alone, but quite another for him to tolerate the "black gall" flowing from pens that "poisoned the minds of the people."[64] Americans of the revolutionary period delighted in the writings of such anti-Crown writers as John Wilkes and the anonymous writer "Junius."[65] Wilkes was a passionate essayist, provocateur of mobs, as well as a sometimes Member of Parliament (he was repeatedly expelled or refused a seat for his writings).[66] His fame in both England and America were assured by a 1764 conviction on charges of seditious libel and blasphemy.[67] One of his crimes stemmed from publishing an essay that accused George III of sanctioning the government's "most odious measures."[68] Junius, whose real name was the subject of much speculation, captured widespread attention and admiration for his brazen denunciations of the Crown government, which he labeled "universally odious."[69] On the eve of the Revolution, James Burgh, an English opposition writer highly popular among disaffected Americans, echoed Cato in defending the people's right to criticize their rulers: "No man ought to be hindered saying or writing what he pleases on the conduct of those

61. Letter from Massachusetts House of Representatives to Gov. Francis Bernard (March 3, 1768), *reprinted in* REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 275 (Josiah Quincy ed., 1865).

62. *Id.*

63. *See* SMITH, PRESS, *supra* note 58, at 29, 62.

64. *Id.* (quoting Lord North).

65. JOHN BREWER, PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III 154–55 (1976).

66. *See generally* ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY (2006).

67. *See id.* at 22.

68. John Wilkes, *The North Briton, No. 45* (April 23, 1763), *quoted in* CURTIS, FREE SPEECH, *supra* note 48, at 42.

69. To the Right Honourable Lord Mansfield (Letter XLI, Nov. 14, 1770), *reprinted in* THE LETTERS OF JUNIUS 184 (C. W. Everett ed., 1927).

who undertake the management of national affairs, in which all are concerned, and therefore have a right to inquire, and to publish their suspicions concerning them."[70]

Nine of the new state constitutions enacted during the Revolution included clauses protecting freedom of expression.[71] Eight of these charters mentioned only liberty of press; Pennsylvania was the sole state to memorialize "[t]hat the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."[72] Virginia's Declaration of Rights, by contrast, pronounced '[t]hat the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments."[73]

It is impossible, then, to separate early American development of speech principles from the course of republican advocacy of democracy that matured into revolutionary ideology. Revolutionaries, by definition, act outside the law. Americans for generations had refused to be bound by the literal constraints of English law regarding political expression. An indelible cultural memory was associated with the case of John Peter Zenger.[74] A New York printer, Zenger spent eight months in jail before being tried in 1735 for seditious libel.[75] His offense consisted of publishing a stinging rebuke of the royal governor's conduct.[76] Zenger's defense at trial in part was based on the contention that his allegations were true, an argument that was rejected by the judge (who served at the pleasure of the governor).[77] The jury acquitted Zenger, blatantly ignoring the judge's instruction that the truthfulness of a seditious libel was irrelevant and that the jurors were limited only to finding whether Zenger was the publisher (a fact that he admitted).[78] Zenger's acquittal did not change the law of seditious libel in the formal sense—Blackstone's summary of the law, which was

70. 3 JAMES BURGH, POLITICAL DISQUISITIONS 254 (1775), *quoted in* CURTIS, FREE SPEECH, *supra* note 48, at 46.

71. CURTIS, FREE SPEECH, *supra* note 48, at 48.

72. PA. DECLARATION OF RIGHTS, art. 12 (1776).

73. VA. DECLARATION OF RIGHTS art. 12 (1776). On early state constitutional provisions relating to speech and press, see Anderson, *supra* note 54, at 464–66.

74. *See* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 19 (Stanley N. Katz ed., 1963).

75. *Id.* at 18.

76. *Id.* at 16–17.

77. *Id.* at 23.

78. *See id.* at 25–26.

inconsistent with Zenger's defense, would not be published for another generation.[79] Practically speaking, however, colonial authorities were foiled in bringing seditious libel charges before courts. As legal historian Michael Kent Curtis has recounted, no one was convicted in the American colonies of seditious libel after the Zenger trial.[80] "Grand juries refused to indict; and petit juries refused to convict."[81] Colonial legislatures, following the example of Parliament, called publishers and writers to account for writings they deemed breaches of their "privilege" on at least twenty occasions, imprisoning some.[82] Yet the press overall was not cowed by these legislative actions, and the practice of legislative investigations for breach of privilege largely ended with the Revolution.[83] The number of newspapers published in America rose from one in the early 1700s to 100 in 1790.[84] Philadelphia alone had seven papers in 1784.[85] Many of these newspapers were aggressively opinionated, often rancorous and sometimes scurrilous in their rebuke of public officials.[86]

Notwithstanding the history of contentious relations between the press and government, the Constitutional Convention of 1787 failed to include any specific provision for free expression.[87] It was not an oversight. About a month before the Convention ended, Charles Pinkney proposed a provision stating: "The liberty of the Press shall be inviolably preserved."[88] No action having been taken on this suggestion, Mr. Pinkney and Mr. Gerry moved in the waning days of the proceedings to include such a declaration.[89] According to James Madison's notes, the only objection came from Roger Sherman of Connecticut, who dismissed the proposal as "unnecessary," because "[t]he power of Congress does not extend to the Press."[90] A vote was taken, and the motion failed 7-4.[91] This

79. *Id.* at 29–30.
80. CURTIS, FREE SPEECH, *supra* note 48, at 46.
81. *Id.*
82. SMITH, PRESS, *supra* note 58, at 7–8.
83. *Id.* at 9.
84. *Id.* at 12.
85. *Id.* at 37.
86. *See id.* at 46–47.
87. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter FEDERAL CONVENTION].
88. *Id.* at 341 (quoting Pinkney's proposals of Aug. 20, 1787).
89. *Id.* at 617.
90. *Id.* at 618.
91. *Id.*

occurred one day after the Convention unanimously rejected Gerry's broader motion to preface the Constitution with a bill of rights.[92]

Despite the absence of a press clause in the Constitution, the Framers did hamstring one potent means used by English authorities to deter and punish dissenters: treason prosecutions.[93] England had a long history of imprisoning and putting people to death for treason on account of writings that in some way criticized the government or the King.[94] Under the Constitution, treason was limited only to "levying [w]ar" against the United States, "or in adhering to their Enemies, giving them Aid and Comfort."[95] While not airtight, this definition made it exceptionally difficult to base a treason charge on mere criticism of the government or its officials.[96] "Complaining, therefore, or writing, cannot be treason," Richard Spaight assured the North Carolina ratifying convention.[97] Spaight had been a delegate at the Philadelphia Convention.[98]

A separate provision conferred immunity on members of Congress "for any [s]peech or [d]ebate in either [h]ouse", but even this immunity did not extend to treasonous speech.[99] Justice Byron R. White explained that the clause "was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch."[100] Read literally, this provision appears to extend immunity against civil or criminal actions only to speeches made on the floor of Congress.[101] However, the Supreme Court has construed it more expansively, to encompass legislative activities by members and their aides in committees and in issuing official committee reports.[102]

92. *Id.* at 588.

93. U.S. CONST. art. III, § 3.

94. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 99–102 (1984). *See also* 8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 307–18 (1966); 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 303 (1883).

95. U.S. CONST. art. III, § 3.

96. *See* JAMES WILLARD HURST, The LAW OF TREASON IN THE UNITED STATES 126–66 (1971); Mayton, *supra* note 94, at 115–17, 135–38.

97. Richard D. Spaight, North Carolina Ratifying Convention of 1788, *reprinted in* 4 ELLIOT'S DEBATES 209 (Jonathon Elliot ed., 1937).

98. 3 FEDERAL CONVENTION, *supra* note 87, at 590.

99. U.S. CONST. art. I, § 6, cl. 1.

100. Gravel v. United States, 408 U.S. 606, 616 (1972).

101. *See* U.S. CONST. art. I, § 6, cl. 1.

102. *Id.* at 617–18. Senator Mike Gravel was protected by this privilege when,

Roger Sherman's argument against including a broad protection for the press in the Constitution, became the standard Federalist line for why the Constitution afforded no protection to the press. Alexander Hamilton asked in the *Federalist Papers*, "why declare that things shall not be done which there is no power to do?"[103] Constitutional structure would protect personal liberties, he assured.[104] "If the Congress should exercise any other power over the press than this," James Iredell wrote, "they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny."[105] In retrospect, this idea seems absurd or even disingenuous, since Congress would only a decade later enact precisely such a limitation on the press in the Sedition Act of 1798.[106] Antifederalists pounced on the omission during ratification, prompting James Wilson to concede that the absence of a press clause was "a copious subject of declamation and opposition."[107] Of all the concerns expressed over the missing bill of rights in ratifying conventions, the most apprehension was raised over the failure to protect the press from federal abuse.[108] Three states—New York, North Carolina and Virginia—accompanied their ratifications with demands that the Constitution be amended to include a bill of rights with a clause protecting the press.[109]

Responding to this state pressure, the bill of rights that Madison proposed to the first Congress included protections for speech, press, assembly, and petition.[110] One of his proposals closely followed a recommendation by Virginia's ratifying

in 1971, he placed forty-seven volumes of the Pentagon Papers on the record of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, which he chaired. *Id.* at 609–11. Gravel exceeded the privilege only when he arranged to have the papers printed by a private press, as opposed to a congressional report, which would have been immunized. *Id.* at 649.

103. THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

104. *See id.*

105. JAMES IREDELL, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION (1788), *reprinted in* 1 DOC. HIST. BILL OF RIGHTS, *supra* note 55, at 454.

106. *See infra* Parts I and II.

107. James Wilson, An Address to a Meeting of the Citizens of Philadelphia (1787), *reprinted in* 1 DOC. HIST. BILL OF RIGHTS, *supra* note 55, at 528.

108. *See, e.g.*, *id.*

109. *See* Anderson, *supra* note 54, at 471 (indicating that several states also wanted safeguards for speech and press).

110. Madison Resolution (June 8, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 12 (Helen E. Veit, et al. eds., 1991).

convention (which in turn tracked Pennsylvania's constitution): "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[111] Another of Madison's amendments encompassed the rights of assembly and petition: "[t]he people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances."[112] These recommendations were combined by the House and then further modified in the Senate, where the clause "consult for their common good" was eliminated and provisions for religious liberties were added.[113] A third proposal from Madison, which he characterized as "the most valuable" of all the Bill of Rights provisions, was approved in the House but rejected by the Senate;[114] it would have provided: "[N]o State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."[115] With some additional tinkering it was sent to the states for ratification and has not been modified since: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[116]

If there was extended debate on the First Amendment in Congress, it went largely unrecorded. The introductory clause, "Congress shall make no law," which originated in the Senate, exactly paralleled the Federalist position on the press clause; that there was no affirmative power in the Constitution that granted Congress the ability to regulate the press. That, together with the rejection of Madison's proposal to guard the people against state incursions on press rights, proves that the amendment only applied to federal legislation. Still, this leaves us with no definitive answer to critical questions about how to interpret the substance of the

111. *Id.*
112. *Id.*
113. *See* 1 JOURNAL OF THE SENATE OF THE UNITED STATES 77 (1789) [hereinafter JOURNAL OF THE SENATE].
114. *See* 1 ANNALS OF CONGRESS 784 (Joseph Gales ed., 1834); JOURNAL OF THE SENATE, *supra* note 113, at 72.
115. 1 ANNALS OF CONGRESS, *supra* note 114, at 783.
116. U.S. CONST. amend. I.

amendment. Did the original framers and ratifiers of the First Amendment intend to preserve the legal order as it then existed on paper? Or did they mean to build upon the revolutionary experience to alter fundamentally the relation between citizen and the state when it came to expression? Intriguingly, the Senate defeated a substitute motion that would have guaranteed freedom of the press "in as ample a manner as hath at any time been secured by the common law."[117] No notes were taken of the debate surrounding this defeated proposal. It could have meant either that the Senators wished to insure greater liberties than at common law, thereby rejecting Blackstone, or that it was unnecessary because the amendment would be interpreted in accordance with the existing legal order. Another possibility is that the Senators wished to allow room for growth of press rights beyond the common law. Finally, it would be highly informative to know what was said about the amendment in state ratifying conventions. Unfortunately, none of those debates were recorded.[118]

What was the existing order regarding speech and press? Some eight years after the First Amendment was approved, Madison wrote that "[i]n every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law."[119] His impression has been verified by modern studies of press activities at the end of the eighteenth century. Leonard Levy, on the other hand, disagreed after reviewing the history of Madison's time: "To assume the existence of a general, latitudinarian understanding that veered substantially from the common-law definition is incredible, given the total absence of argumentative analysis of the meaning of the clause on speech and press."[120] Levy was rightly criticized by scholars for his initial assessment of the period, which neglected the vigorous press alluded to by Madison, and for overemphasizing

117. JOURNAL OF THE SENATE, *supra* note 113, at 70.

118. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1171 (Merrill Jensen ed., 1976) [hereinafter 2 DOC. HIST. RATIFICATION OF THE CONSTITUTION].

119. James Madison, Report on the Virginia Resolutions of 1798, *reprinted in* 4 ELLIOT'S DEBATES, *supra* note 97, at 570.

120. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 225 (1960) [hereinafter LEVY, LEGACY].

official suppression of the press.[121] Levy, however, responded to critics by publishing a thoroughly detailed study of speech and press rights and expressive practices in early America, which reaffirmed his original conclusion that America of the late eighteenth century was far from a bastion of unbridled expression. Freedom of the press was widely understood by jurists to be no more than what Blackstone described, and the right of speech was not even recognized by the common law.[122] James Wilson, Levy noted, said at the Pennsylvania ratifying convention that "what is meant by liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual."[123]

Unfortunately, statements such as Wilson's provide us with little specific evidence from the drafting and ratification process as to whether the First Amendment was intended to surpass the common law in shielding speakers and writers. It is especially hard to reconstruct the meaning of "freedom of *speech*," as opposed to the press. Historians of the First Amendment have pointed out that "freedom of speech, unlike freedom of the press, had little history as an independent concept when the first amendment was framed."[124] In any event, assuming that the amendment was meant to be more libertarian than the existing law, this says nothing specifically useful for resolving the countless disputes about speech and press freedoms that erupted in the twentieth century.[125]

The ambiguities of the early experience with these questions can be appreciated by a study of the first major test of the First Amendment in the courts: the Sedition Act of 1798. If for no other reason, the Act is important to examine because the Court posthumously condemned it as inimical to First Amendment ideals—more than 150 years after the fact, which is more than a tad bit anachronistic. Writing in 1964, Justice Brennan, like Justice

121. *See* Dwight L. Teeter Jr., *From Revisionism to Orthodoxy*, 13 REV. AMER. HIST. 518, 520 (1985); James L. Crouthamel, *Book Review*, 5 J. EARLY REPUBLIC 549, 549 (1985).

122. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 5, at 185–219 (1985) [hereinafter LEVY, EMERGENCE].

123. The Pennsylvania Convention (Dec. 1, 1787), *in* 2 DOC. HIST. RATIFICATION OF THE CONSTITUTION, *supra* note 118, at 455.

124. Anderson, *supra* note 54, at 487.

125. *See* Mayton, *supra* note 94, at 96 ("the press was a trenchant and persistent critic of government and government officials.").

Holmes before him, asserted that "although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional."[126] But history is not a court, and congressional repayment of fines (as well as President Jefferson's pardoning of those convicted) does not establish the intention of the First Amendment's proponents and ratifiers. Those acts of contrition came from Republicans whose presses had been the object of attack by the Sedition Act.[127] In any event, a brief probe of the Sedition Act reveals more ambiguity than certainty in the intended meaning of the First Amendment.

Passed by a Federalist-controlled Congress and approved by President Adams, the Sedition Act criminalized criticism of the federal government or the president.[128] Under the Act, it was a federal offense to:

> write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.[129]

Violators could be fined up to $5000 (a huge sum then) and imprisoned for any time from six months to five years.[130] President Adams, whose prickly sensibilities revolted at the stinging and at times utterly insulting digs of the opposition press, was thus protected from rebuke. Notably, and suspiciously, the law did not shield the Vice-President from criticism—in others words, Adams' arch-rival Thomas Jefferson was fair game for the Federalist press.[131] Another nice feature was a sunset provision terminating the Act on the last day of Adams' administration.[132] In some fourteen prosecutions for violating the Act, Supreme Court judges presiding

126. New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

127. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

128. Sedition Act of 1798, 1 Stat. 596 (1798).

129. *Id.* § 2.

130. *Id.* § 1.

131. *See id.* § 2.

132. JAMES M. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 144 (1956).

at circuit courts upheld the constitutionality of the Act.[133] Every Justice on the Court was a Federalist; every defendant a Republican.[134] Federal marshals, who owed their jobs to the President, selected the jurors.[135] Convictions were obtained for what today would be considered ordinary political exuberance. For example, Justice Samuel Chase sentenced a man in Boston to eighteen months' imprisonment for erecting a liberty pole with the motto, "Downfall to the Tyrants of America."[136] Several Republican newspapers were forced to close due to enforcement of the Act.[137]

The motivation for the Federalist-controlled Congress to pass the Sedition Act is a bit mysterious inasmuch as common-law prosecutions could accomplish the same end. Federalists had been bringing sedition prosecutions under common law for several years against well-known Republican editors, both in federal and state courts, causing the demise of a number of publications.[138] Only days before the Act became effective, the Republican editor Benjamin Franklin Bache was arrested for criminal libel against President Adams.[139] Republicans, in and out of Congress, attacked the Act with a mixture of free speech and states' rights arguments.[140] A Virginia Congressman, John Nicholas, contended during floor debates in Congress that the press was "the heart and the life of a free government"; that "the people have no other means of examining their conduct but by means of the press, and an unrestrained investigation through them of the conduct of the Government."[141] Other Republicans lodged similar complaints, often predicting that the Act would be abused for partisan ends.[142] They pointed to the ways in which the Act could be so twisted: defendants would not be tried in their vicinity; Federalist marshals would hand-pick juries; prosecutors and judges would be

133. *See* LEVY, EMERGENCE, *supra* note 122, at 297–300.
134. *See* JOHN C. MILLER, THE FEDERALIST ERA: 1789–1801, at 235 (1960) (stating that the Federalist administration indicted four leading Republican newspapers).
135. STEWART, *supra* note 57, at 468.
136. SMITH, *supra* note 132, at 260, 267 (referring to United States v. David Brown).
137. *See* MILLER, *supra* note 134, at 235.
138. *See id.*
139. *Id.* at 233 n.15; SMITH, *supra* note 132, at 189.
140. *See* LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 55 (1963).
141. 8 ANNALS OF CONG. 2144 (1798).
142. *See id.* at 2164 (statements of Rep. Gallatin).

appointees of the same Administration that the defendants were said to have opposed.[143] These arguments turned out to be exactly on target, yet when the Act was debated in Congress Republican legislators and their sympathizers in the press persistently emphasized invasion of states' rights as its most fatal flaw.[144]

During the congressional debates on the Act, Republicans taunted the Federalists on the necessity for its passage. It was common knowledge that many states had statutes affirming the common-law doctrine of seditious and malicious libels—and this in spite of the strict injunction written into their constitutions providing for the freedom of the press. Republican representative and onetime Anti-Federalist Nathaniel Macon asked from the floor: "He knew persons might be prosecuted for a libel under the State Governments; but if this power exist in full force at present, what necessity can there be for this bill?"[145] And there was something to this: the Sedition Act "did not propose to do more than the states had already done; nor did it alter in any way the time-honored common-law definition of sedition."[146] In attacking the Act, Madison conceded that, "[i]t is vicious in the extreme to calumniate meritorious public servants."[147] The remedy, he urged, could be obtained in the "common judicatures" of the states: "Every libelous writing or expression might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers or private citizens."[148] For Madison and other Republicans, the Act was a product of "the doctrine of implication and expediency," the same principles they thought had been used unconstitutionally to enlarge congressional powers on other occasions, as in the creation of the national bank.[149] There was "a similar and decisive answer," he retorted: Congress' powers were specifically defined in the Constitution, and no authority had been

143. SMITH, *supra* note 132, at 140–41 (summarizing concerns of Rep. Gallatin and Rep. Nicholas).

144. *See id.* at 148–49.

145. 8 ANNALS OF CONG. 2106 (1798) (referring to Rep. Otis' comment that the bill was conformable to common law).

146. JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 80 (1951).

147. Madison, *supra* note 119.

148. *Id.*

149. 6 JAMES MADISON, THE WRITINGS OF JAMES MADISON 333–37 (Gaillard Hunt ed., 1906-1910) (1799) [hereinafter MADISON WRITINGS].

given to pass the Sedition Act.[150] Employing the old Federalist line, Madison argued that Congress received "no power whatever over the press" under the original Constitution, and "the first amendment was intended as a positive and absolute reservation of it."[151] Claims that powers are "inherent, implied, or expedient," he contended, were

> obviously the creatures of ambition; because the care expended in defining powers would otherwise have been superfluous. Powers extracted from such sources will be indefinitely multiplied by the aid of armies and patronage which, with the impossibility of controlling them by any demarcation, would presently terminate reasoning, and ultimately swallow up the State sovereignties.[152]

Answering these charges, Federalists reminded their opponents that the First Amendment was not a total prohibition on legislation touching the press, but rather guaranteed "freedom of speech." That term was defined by the common law, explained Rep. Harrison Gray Otis.[153] He supported this assertion by quoting Blackstone's distinction between prohibited prior restraints and allowable prosecutions by injured parties, "whether it be the Government or an individual," for speech or writing that was "false, malicious, and seditious."[154] Like Otis, his colleague Rep. Robert Goodloe Harper drew the familiar line between protected speech and expressions that encompassed "sedition and licentiousness."[155] Numerous precedents were cited by Federalists to prove that this was the law. Rep. Otis reminded Republicans that even in those states with constitutions guaranteeing "the liberty of speech and of the press . . . by the most express and unequivocal language, the Legislatures and Judicial departments of those States had adopted the definitions of the English law, and provided for the punishment of defamatory and seditious libels."[156] Federal courts, it was noted, already had jurisdiction over common-law sedition. Punishing sedition was an exercise of a government's inherent right of self-defense, and the crime was spelled out under the

150. *Id.*
151. *Id.*
152. *Id.*
153. 8 ANNALS OF CONG. 2147 (1798).
154. *Id.* at 2148.
155. *Id.* at 2167.
156. *Id.* at 2148.

common law.[157] What the Act accomplished, Federalists insisted, was a *liberalization* of the harsh common law rule of seditious libel.[158] To convict under the statute, intent must be proved, whereas at common law the mere act of publication was enough to find guilt.[159] At common law, punishment was discretionary with the court, whereas the Act set a definite term.[160] Unlike the common law, truth could be offered in defense.[161] Juries would decide both law and fact, again a departure from common law.[162]

In practice, the reforms touted by Federalists proved anemic, exactly as Republicans had predicted. Judges were hostile to defendants, juries were packed with Federalist partisans, and the defense of truth was gutted by Justice Chase's ruling that the defendant had the burden of showing truth beyond a "marrow."[163] During the floor debates on the Act, Rep. Nicholas foresaw that the judges in trials under the Act "would be so far interested in the issue, that the trial of the truth or falsehood of a matter would not be safe in their hands."[164] He was not impressed by the Federalist distinction between liberty and licentiousness: "he wished to know where the one commenced and the other ended? Will they say the one is truth and the other falsehood!"[165] Truth was one thing in theory, proving it in court another, Nicholas contended, using reasoning that anticipated modern Supreme Court decisions on the press.[166] Printers "would not only refrain from publishing anything of the least questionable nature, but they would be afraid of publishing the truth, as, though true, it might not always be in their power to establish the truth to the satisfaction of a court of justice."[167] It was precisely because of the risk of abuse and the consequent muzzling of the press, he exclaimed,

157. LEVY, EMERGENCE, *supra* note 122, at 3–15; MILLER, *supra* note 146, at 232–33.

158. 10 ANNALS OF CONG. 921, 940, 950 (1801). *See also* 8 ANNALS OF CONG. 2989 (1798) (noting from the Report of House Select Committee that Sedition Act had "enlarged instead of abridging the freedom of the press.").

159. LEVY, EMERGENCE, *supra* note 122, at 11; MILLER, *supra* note 146, at 81–82.

160. LEVY, LEGACY, *supra* note 120, 50–51.

161. LEVY, EMERGENCE, *supra* note 122, at 12, 297.

162. *Id.*

163. United States v. Cooper, 25 F. Cas. 631, 642–43 (C.C.D. Pa. 1800).

164. 8 ANNALS OF CONG. 2140 (1798).

165. *Id.*

166. *Id.*

167. *Id.* at 2141.

that "the General Government has been forbidden to touch the press."[168]

Most of the Federalists' arguments that appeared in the congressional debates are also replicated in the judicial writings of this period. Justice James Iredell, for example, quoted extensively from Blackstone during a grand jury charge to justify his conclusion that the First Amendment only prohibited prior restraints. It was necessary to "censure the licentiousness," Iredell stated, in order "to maintain the liberty of the press."[169] If anything, the Justices were more aggressive in their support of the Act than many congressional Federalists. In the same address, Iredell urged that the opposition press was "by arts of sophistry . . . inflaming the passions of weak minds, delud[ing] many into opinions the most dangerous, and conduct[ing] them to actions the most criminal."[170] These sentiments reflected the Federalist worldview that ordinary people were easily misled by demagogues to the detriment of social order. Consider this grand jury charge by Justice William Paterson:

> Seditious persons are common disturbers of public repose, and pests to society; they are bad men and worse citizens. The apostolic rule to mind our own business, and study to be quiet is an excellent guide in social life. Let us seek peace and be obedient to the laws; let us fear God, respect our government, and honor the constituted authorities of our country.[171]

Justice Chase took an especially hard line in his conduct of Sedition Act trials,[172] earning a well-deserved reputation for abusive behavior that became the basis for his impeachment in 1804 and near conviction in 1805.[173] Chase went out of his way to encourage indictments by recommending that grand juries look carefully at certain publications or by suggesting that there were seditious

168. *Id.* at 2140.

169. J. Iredell, Charge to the Grand Jury for the District of Pennsylvania (Apr. 11, 1799), *reprinted in* CLAYPOOLE'S AMERICAN DAILY ADVERTISER (Philadelphia), May 17, 1799, *quoting* 4 Blackstone, *supra* note 42, at 151.

170. *Id.*

171. Grand Jury Charge, (Paterson, J.), in Paterson Papers (n.p., n.d.), (original in Rutgers University Library).

172. *See* United States v. Cooper, 25 Fed. Cas. 631, 642–43 (C.C.D. Pa. 1800) (No. 14,865) (stating defendant bears the burden of proving "truth" beyond a marrow).

173. *See* JANE S. ELSMERE, JUSTICE SAMUEL CHASE 1 (1980); CHARLES G. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789–1835 261–64 (1944).

writings circulating in the community.[174] Though it was common for judges to advise juries of their views on the merits, Chase vituperated against defendants, as when he announced to a jury that the defendant's publication constituted "the boldest attempt I have known to poison the minds of the people."[175] Referring to one of Chase's trials, an article of impeachment complained of his "unusual, rude, and contemptuous expressions towards the prisoner's counsel," which "manifested . . . an indecent solitude . . . for the conviction of the accused."[176] The Senate voted eighteen to sixteen to convict on this count, short of the required two-thirds majority.[177] Disgusted with this outcome, Jefferson lamented that "impeachment is a farce which will not be tried again."[178]

No Republican was fooled into missing what the Federalists had in mind by statutorily securing the option of sedition prosecutions in federal courts.[179] State prosecutions for criticism of the national government were highly improbable in Republican-dominated areas.[180] Moreover, enormous controversy had erupted over whether *any* federal non-statutory crimes were constitutional—Republicans maintained that the Constitution only authorized statutory crimes.[181] Given that climate, Federalists had a rationale for erecting a federal statutory barrier against what they considered seditious libel.[182] In the short run, they were successful at the endeavor since the Federalist judiciary played an active role in vigorously enforcing of the Act.[183] But, on the whole, the experience with the Sedition Act deeply alienated the populace from the Federalist Party and galvanized Republicans in their resistance.[184]

It may be, as Justice Brennan wrote for the Court in 1964, that the Sedition Act controversy "first crystallized a national awareness

174. HAINES, *supra* note 173, at 160.
175. *Cooper*, 25 Fed. Cas. at 642.
176. 2 TRIAL OF SAMUEL CHASE (S. Smith & T. Lloyd eds., 1805), *reprinted in* LAW AND JURISPRUDENCE IN AMERICAN HISTORY 230, 247 (S. Presser & J. Zainaldin eds., 2000).
177. *Id.*
178. Letter from Thomas Jefferson to William Branch Giles Monticello (Apr. 20, 1807), *reprinted in* 10 JEFFERSON WORKS 387.
179. *See* LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 257–58 (1978).
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

of the central meaning of the First Amendment."[185] Awareness is not the same thing as concordance on what the episode meant for the constitutional law of free expression. Brennan's opinion quoted the Virginia Resolutions of 1798 (written by Madison), which lambasted the Act as "leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[186] The Kentucky Resolutions of 1798-99 (authored by Jefferson) struck a similar chord.[187] But, as already noted, Madison had allowed that state prosecutions were available to punish those who libeled public officials. When Republicans themselves controlled the government, they were not above using libel actions to punish political enemies. Jefferson was a case in point. On a number of occasions he publicly extolled the free press. His Kentucky Resolutions declared the Sedition Act "does abridge the freedom of the press, is not law, but is altogether void, and of no force."[188] In his first inaugural address, the Sage of Monticello counseled the country to treat speech that espoused a breakup of the country with the medicine of the marketplace: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[189] Yet Jefferson was firmly of the view that a publisher could be punished for false statements and injuries to personal reputation. In a letter to Madison concerning the proposed Bill of Rights, Jefferson asserted that individuals should be permitted "to publish any thing but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations."[190] Upon becoming President, and finding himself the object of an onslaught of criticism, however, he urged the governor of Pennsylvania to

185. New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

186. *Id.* at 274.

187. Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 ELLIOT'S DEBATES, *supra* note 97, at 540–45.

188. *Id.* at 541.

189. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801).

190. Letter from Thomas Jefferson to Thomas McKean (Feb. 19, 1803), *reprinted in* 9 THE WORKS OF THOMAS JEFFERSON 451–52 (Paul L. Ford ed., 1904-1905).

prosecute Federalist editors for personal attacks.[191] Remarking that "a few prosecutions" would have a "wholesome effect in restoring the integrity of the presses," Jefferson cautioned against "a general prosecution," which "would look like persecution."[192] Federalists were ruining the press, he contended, "by pushing its licentiousness & its lying to such a degree of prostitution as to deprive it of all credit."[193]

Jefferson's philosophy of free expression was similar to that of America's first great journalist, Benjamin Franklin. Writing in 1789, Franklin allowed that it was proper for laws to safeguard a person's reputation, while at the same time the press must have complete freedom for "discussing the propriety of public measures and political opinions."[194] As sensible as this may seem at first glance, distinguishing between discussion of public affairs and criticism of individual officials often is meaningless. An attack on a government policy as misguided could be (and has been) translated into the basis for a libel action by the official responsible for the policy. For this reason, Justice Brennan's 1964 opinion in *New York Times v. Sullivan* refused to allow an official to claim libel for false statements directed at government actions.[195] Brennan observed that the proposition would "transmut[e] criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed."[196]

Reviewing the events concerning free expression from the period before the Revolution through the First Amendment and then in the crucible of the Sedition Act, it is best not to expect much enlightenment that is pertinent to modern controversies.[197] However much weight may properly be assigned to the repudiation of the Sedition Act, the reality is that America's founding generation did not write on the same page as the modern Court. Exponents of one view or another about the Act were not

191. SMITH, PRESS, *supra* note 58, at 89 (quoting Jefferson's letter to Governor Thomas McKean in 1803).

192. JEFFERSON, *supra* note 190, at 451–52.

193. *Id.*

194. SMITH, PRESS, *supra* note 58, at 11 (quoting Benjamin Franklin's 1789 newspaper essay).

195. New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

196. *Id.*

197. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 354–63 (1997) (discussing freedom of expression and association).

disinterested scholars or dispassionate jurists. Their legal world remained one in which it was taken for granted that the state had the prerogative to punish speech with a "bad tendency" to cause social harms. Federal sedition prosecutions disappeared with the expiration of the Sedition Act in 1801, and a few years later the Court held that federal courts had no constitutional authority to punish individuals for common law crimes, including sedition. State sedition actions gradually fell into desuetude before the Civil War. Yet the theoretical foundations for state repression remained. Although the Court would hear no seditious libel cases for the remainder of the nineteenth century, when it next encountered such a provision—the Espionage Act of 1917—it felt unconstrained by the eighteenth century record. That story remains to be explored; meanwhile, we need to see how free expression fared during the more than hundred years that elapsed after the First Amendment was adopted.

II. FREEDOM OF EXPRESSION FROM THE NINETEENTH CENTURY TO WORLD WAR I

Until fairly recently, the nineteenth century was regarded as a sterile sea when it came to constitutional rulings on free expression.[198] For most of the twentieth century, both the Supreme Court, as well as the academy, largely ignored the period from the Sedition Act until World War I, when Congress enacted measures to curb speech believed to interfere with the war effort.[199] Historians have begun to fill in the gap by combing the period for evidence of judicial and popular attitudes about speech and press. One scholar uncovered some sixty cases from the Court that related to the subject.[200] On close examination, however, almost none of these decisions dealt directly with the First Amendment.[201]

198. *See* David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 522 (1981).

199. *See* Espionage Act, ch. 30, title I, § 3, 40 Stat. 219 (1917) (current version at 18 U.S.C. § 2388 (2000)); Sedition Act, ch. 75, §§ 3-4, 40 Stat. 553–54 (1918) (repealed 1921).

200. *See* Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 266 n.15 (1986).

201. *See, e.g.*, Davis v. Commonwealth of Massachusetts, 167 U.S. 43 (1897); *Ex parte* Curtis, 106 U.S. 371 (1882); *Ex parte* Jackson, 96 U.S. 727 (1877); United States v. Kirby, 74 U.S. 482 (1868); United States v. Bromley, 53 U.S. 88 (1851); White v. Nicholls, 44 U.S. 266 (1845); Anderson v. Dunn, 19 U.S. 204 (1821); United States v. Hudson, 11 U.S. 32 (1812).

To a large extent, the lack of case law was a consequence of circumstances. Inasmuch as the Court resolutely denied that the amendment applied to the states, this left only federal actions subject to review.[202] Here again, there was not much to concern the Court until the second half of the nineteenth century, when federal regulatory legislation was passed raising potential First Amendment issues.[203] Even then the Court issued only a handful of noteworthy rulings, and most of those occurred at the end of the century and early in the next.[204] This absence of judicial activity, however, does not signify a void in societal disputes relating to government and expression. Nor does it mean the press had become so tame that officialdom was unprovoked by journalistic attacks, or that the experience of the Sedition Act had frozen the ink in pens. To the contrary, newspapers and magazines showed few restraints. De Tocqueville observed during his travels in 1831-32, that "[i]n America there is scarcely a hamlet that has not its newspaper."[205] He found the American press duller than that of France, and more space was consumed in U.S. papers by advertisements, but he conceded that its influence in America is "immense."[206] It caused political life to circulate through all the parts of that vast territory.[207] Its eye was constantly open to detect the secret springs of political designs and to summon the leaders of all parties in turn to the bar of public opinion.[208] During the closing years of the century, muckrakers launched the new style of yellow journalism that relentlessly exposed corruption and business abuses.[209] On the other hand, the occasions in which the Court did make pronouncements about the First Amendment generally were not auspicious ones. After a thorough study of period from the Civil War through World War I, David M. Rabban concluded that "no group of Americans was more hostile to free speech claims before

202. *See* Rabban, *supra* note 198, at 525.

203. Federal obscenity laws are one example; *see infra* notes 311-315 and accompanying text.

204. *See, e.g.*, cases cited in notes 321-328, *infra*.

205. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 80 (Tom Griffin ed., 1998).

206. *Id.* at 81.

207. *Id.*

208. *Id.*

209. *See generally* CURTIS, FREE SPEECH, *supra* note 48 (discussing history of free expression in the nineteenth century).

World War I than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court."[210]

Despite their notoriety, most of the important disputes over free expression in the nineteenth century never reached the courts.[211] No better example of this can be found than the federal government's reaction to efforts by antebellum Southern states to extinguish the abolitionist press.[212] Pursuing the cause of ending slavery, abolitionists produced a torrent of speeches, pamphlets, books and newspapers to champion their cause.[213] Almost all of this activity occurred in the North, but publications were sent from there by the postal service throughout the country, including to slave states.[214] The federal government controlled the nation's postal service by monopolizing the use of postal roads.[215] More so than today, mailings were an essential medium of free expression.[216] Newspapers constituted the bulk of the mail, which enabled abolitionists to spread information throughout the country.[217] In 1835, a mass mailing campaign of anti-slavery literature to prominent Southerners provoked a furious outcry in both the South and the North.[218] Anti-abolitionists warned that the provocations they saw in these writings would foment slave rebellions (notwithstanding that almost every slave was illiterate) and lead to civil war and dissolution of the union.[219] In the North, mobs attacked abolitionist assemblies.[220] Public meetings denounced agitation against slavery.[221] Southern states passed (or already had) laws banning abolitionist writings, and they demanded an end to the postal assault.[222] President Andrew Jackson directed his Postmaster General to deliver "those inflammatory papers . . . to none but who will demand them as subscribers; and in every

210. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 15 (Arthur McEvoy & Christopher Tomlins eds., 1997).
211. *See* CURTIS, FREE SPEECH, *supra* note 48, at 416.
212. *See generally id.* at 155–81, 407 (discussing the postal campaign presented by Andrew Jackson's administration and Congress' response).
213. *Id.* at 155.
214. *Id.*
215. *See* Gibson, *supra* note 200, at 293–94.
216. *Id.* at 293.
217. *Id.* at 294.
218. CURTIS, FREE SPEECH, *supra* note 48, at 155.
219. *Id.* at 135–36.
220. *Id.* at 140.
221. *Id.*
222. *Id.* at 158.

instance the postmaster ought to take the names down, and have them exposed thro [sic] the publik [sic] journals as subscribers to this wicked plan of exciting the negroes . . . to massacre."[223] Jackson added that this would surely put an end to Southern readership, as being exposed as a subscriber would bring the person into such disrepute within the entire South that they would be compelled to desist "or move from the country."[224] Amos Kendall, the Postmaster General receiving this directive, endorsed the New York postmaster's decision to deny mailing privileges to the American Anti-Slavery Society.[225] Southern postmasters, with Kendall's approval, likewise would not knowingly deliver abolitionist literature on pain of prosecution by their states.[226] But no judicial challenges were brought against the federal government for its complicity with the South's censorship, so no formal precedent was set.[227]

President Jackson urged Congress to take even stronger measures, by making it a federal offense, "under severe penalties," to circulate "in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection."[228] Despite the fervent efforts of South Carolina Senator John C. Calhoun,[229] the Senate declined the President's invitation, in part because the proposal was thought to violate the First Amendment's stricture[230] that "Congress shall make no law"[231] limiting speech or press. A compromise measure, to make it illegal for postmasters to deliver mail contrary to state law, also failed in the Senate, notwithstanding that this was already the policy of the post office.[232] In the House, the issue of abolitionist mailings died in

223. *Id.* at 156 (quoting Andrew Jackson's letter to Amos Kendall on Aug. 9, 1835); *see also* 5 THE CORRESPONDENCE OF ANDREW JACKSON 360–61 (John S. Bassett ed., 1931).

224. CURTIS, FREE SPEECH, *supra* note 48, at 156.

225. *Id.*

226. *See id.* at 157.

227. *See generally* CURTIS, FREE SPEECH, *supra* note 48, at 131–93 (discussing the reaction against abolitionists and the successful effort to block abolitionist mailings). *See also* Gibson, *supra* note 200, at 293–94 (discussing the importance of the mails to dissemination of information).

228. A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 175–76 (James Richardson ed., 1896) (quoting Andrew Jackson, Seventh Annual Message to Congress (Dec. 7, 1835)).

229. CURTIS, FREE SPEECH, *supra* note 48, at 163–64.

230. *See id.* at 170–73.

231. *Id.* at 176 (quoting U.S. CONST. amend. I).

232. *Id.* at 174.

committee.[233] At about the same time, the House took up a related question: what to do about the deluge of petitions—some two million—it was receiving urging abolition.[234] Discussion of the petitions in the House was anathema to Southern representatives, who knew that the debates would be reported in newspapers everywhere and would be impossible to censor.[235] On this score, they were successful for a considerable time. In 1836, and for seven years thereafter, the House passed a series of resolutions to table without further action "all petitions, memorials, resolutions, propositions, or papers, relating in any way" to slavery.[236] That action was taken in spite of the First Amendment's protection of the right "to petition the government for a redress of grievances."[237] Representative John Quincy Adams, formerly the President and now an outspoken anti-slavery congressman, protested in vain that the resolution was unconstitutional for precisely this reason.[238] Using a version of the "marketplace of ideas" philosophy that Jefferson had invoked against the Sedition Act, Adams advocated toleration for error, "to grant freedom of speech, and freedom of the press, and apply reason to put it down."[239] Adams persisted in objecting until 1844, when the House lifted the restriction on petitions.[240] Again, no court became involved in the matter.[241]

Until the late 1830s, abolitionists were effectively shut out of the regular press, sometimes denied access to public and private halls to hold meetings, often condemned and at times violently attacked by mobs.[242] And that was in the North.[243] Their activities were illegal in the South, though only a few intrepid souls would brave the real threat of violence should they argue for emancipation.[244]

233. *Id.* at 164–65.
234. *See id.* at 175.
235. *Id.* at 175–76.
236. 12 REGISTER OF DEBATES IN CONGRESS 4052 (1836), *quoted in* CURTIS, FREE SPEECH, *supra* note 48, at 177.
237. CURTIS, FREE SPEECH, *supra* note 48, at 176–78 (quoting U.S. CONST. amend. I).
238. *Id.* at 177–80.
239. Rep. John Quincy Adams, *Congressional Globe*, 24th Cong., 1st Sess. 137 (1836), *quoted in* CURTIS, FREE SPEECH, *supra* note 48, at 177.
240. CURTIS, FREE SPEECH, *supra* note 48, at 180.
241. *See generally id.*
242. *See id.* at 140.
243. *Id.*
244. Some 500 accounts of mob violence appeared during a single week in 1835, according to Hezekia Niles, the editor of the *Niles Register*. *See* RUSSELL B.

In the North, however, the tide of intolerance for abolitionist speech began to turn in the late 1830s. A pivotal event occurred during the evening of November 7, 1837.[245] A mob in Alton, Illinois (a free state) murdered Elijah P. Lovejoy, an abolitionist newspaper publisher and Presbyterian minister who was attempting to defend his printing press against destruction by vigilantes.[246] Lovejoy already had been driven from St. Louis (across the Mississippi River), in the slave state of Missouri, on account of his advocacy against slavery.[247] Having lost three presses to rampaging mobs, Lovejoy gave his life defending a fourth, thereby becoming a martyr for both abolitionism and the free press.[248] Michael Kent Curtis writes that Lovejoy's killing "produced an immense public reaction," as the brazen murder "crystallized the fear that slavery would destroy free speech and civil liberty in the North as well as the South."[249] Resolutions denouncing the killing were passed in public meetings throughout the North and large numbers of newspapers began to speak out against the denial of speech rights to abolitionists.[250] Mobs did not desist in their attacks but popular attitudes began to change. By 1856, the Republican Party (not to be confused with Jeffersonian Republicans, whose heirs now comprised the Democratic Party) campaigned on the theme, "Free Speech, Free Press, Free Men, Free Labor, Free Territory and Frémont," the last being a reference to its unsuccessful presidential candidate, John C. Frémont.[251] Republicans would prevail with Lincoln's election in 1860, a result that blew the nation apart.[252]

From these events, Professor Curtis draws two important lessons. First, the reality of free speech is not solely a matter of judicial interpretation, as no courts were responsible for the evolution of attitudes about expression before the Civil War.[253] As Curtis shows, "crucial free speech decisions [were] made by the

NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830-1860, at 177 n.9 (1963).

245. CURTIS, FREE SPEECH, *supra* note 48, at 216.

246. *Id.*

247. *Id.* at 216–17.

248. *Id.*

249. *Id.* at 227.

250. *Id.* at 250–55.

251. RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837-1860, at 284 (1976).

252. *See generally* CURTIS, FREE SPEECH, *supra* note 48, at 216–70 (discussing Lovejoy's death and its effect on attitudes towards free expression).

253. *Id.*

citizens, by the press, by legislators, and by public officials who [were] not judges."[254] Second, during the 1830s and particularly after Lovejoy's murder, politicians, the press, and the public made widespread use of the terms "rights" and "privileges" in connection with speech and printing by citizens.[255] Senator Daniel Webster, who had opposed Jackson's effort to constrain mailing of abolitionist literature in 1834, declaimed twenty years earlier in an address to the House of Representatives that that the "freedom of inquiry, discussion, and debate" constituted a "high constitutional privilege."[256] Frederick Douglass quoted Webster's words at a meeting in 1852, when he criticized efforts to suppress abolitionist speech.[257] Webster, Douglass related, had declaimed that it was "the ancient and the undoubted prerogative of the people to canvas public measures, and the merits of public men . . . . It is as undoubted as the right of breathing the air, or walking on the earth."[258]

Understanding that the term "privilege" included speech offers an insight into the Fourteenth Amendment's command that states not "abridge the privileges and immunities of citizens of the United States."[259] "During the campaign of 1866," Curtis writes, "many people praised the Fourteenth Amendment as protecting all rights enumerated in the Constitution, particularly freedom of both speech and press."[260]

An additional lesson can also be found in these episodes. The intolerance directed against abolitionists by public officials and the acceptance of such by the populace offers an important insight about the conception of free expression in the early republic. States that had once condemned the Sedition Act as injurious to public discussion of current events, and enshrined the rights of speech and press in their constitutions, thereafter violated those rights in gross to preserve the prevailing conception of social order.

254. *Id.* at 257.

255. *Id.* at 257–58.

256. *Id.* at 230 (tying together the popular use of "rights" and "privileges" and Fourteenth Amendment) and 944. *See also* 28 ANNALS OF CONG. 945 (1814) (statement of Rep. Daniel Webster).

257. 2 THE FREDERICK DOUGLASS PAPERS 415–16 (John W. Blassingame ed., 1982) (quoting Daniel Webster's speech on enlistments delivered in the House of Representatives on Jan. 14, 1814).

258. *Id.*

259. *Id.* (interpreting the language the U.S. CONST. amend. XIV).

260. Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 GEO. WASH. LAW REV. 1269, 1280 (1998).

Virginia, the home of Madison's 1798 Virginia Resolution, enacted a comprehensive criminal statute in 1836 that punished the publication of any writing encouraging slave rebellions or "denying the master the right of property in their slaves, and inculcating the duty of resistance to such right."[261] Although the Virginia Supreme Court interpreted the statute in technical ways to overturn two convictions under it, the measure remained on the books and was enforced, as were those in other Southern states.[262] No authority in the South was willing to heed Jefferson's admonition to tolerate errors by leaving reason free to refute it.[263] Considering the larger history of free expression, this is unremarkable. A government's toleration for dissent varies directly with its *perception* of the threat to public welfare from the speech. Just as the South saw the very integrity of its social order endangered by abolitionist speech, the federal government during the Civil War would attempt to stifle the opposition press in the North.

President Lincoln left an ambiguous civil liberties record. His administration or the military he commanded arrested a variety of speakers and publishers, including newspaper editors.[264] Both military and civilian tribunals were used in these proceedings, themselves a small part of the thousands of cases involving offenses relating to the war.[265] Lincoln personally ordered the arrest and seizure of the offices of two New York newspapers, for printing a "false and spurious proclamation purporting to be signed by the President . . . which publication is of a treasonable nature."[266] Confusing the constitutional record, however, is the fact that many of these incidents occurred in areas of the country where the writ of habeas corpus had been suspended by Lincoln or one of his

261. CURTIS, FREE SPEECH, *supra* note 48, at 261 (quoting An Act to Suppress Incendiary Publication, ch. 66, 1836 Va. Acts 44–45).

262. *See* Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 WM. & MARY L. REV. 1157, 1194–97 (2006).

263. *See* Michael Kent Curtis, *The Curious Attempt to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785, 805 (1995). "As many contemporaries saw it, disseminating abolition literature in the South was simply a crime." *Id.*

264. Paul Finkelman, *Civil Liberties And Civil War: The Great Emancipator As Civil Libertarian*, 91 MICH. L. REV. 1353, 1357–58 (1993).

265. *Id.* at 1358–59.

266. Letter from Abraham Lincoln to John A. Dix, (May 18, 1864), *in* 7 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 347–48 (Roy P. Basler ed., 1953) [hereinafter LINCOLN]. *See also* FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 232–47 (Harold L. Nelson ed., 1967).

generals.[267] By presidential proclamation in 1862, anyone held under military authority was barred from seeking judicial relief by habeas corpus.

Accordingly, there are few judicial rulings relating to possible violations of the First Amendment by Lincoln's government.[268] This does not mean that there were no First Amendment violations during the war; the truth is quite the contrary. Rather, the denial of habeas corpus—the Great Writ—meant that there was no judicial review of the federal government's actions.

Of the hundreds of military tribunals held for civilians, a significant number heard charges of disloyalty against copperhead Democrats or their newspapers for verbal attacks on the war or Lincoln himself.[269] In the same 1862 proclamation, Lincoln ordered that "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to the Rebels . . . shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission."[270] Generals in the army issued parallel commands. General Ambrose Burnside, in charge of the Department of Ohio, proclaimed in a standing order to the populace that "[t]he habit of declaring sympathies for the enemy will not be allowed in this Department. Persons committing such offenses will at once be arrested."[271] Another general commanding in Indiana banned any speech or writing tending "to bring the war policy of the Administration into disrepute."[272]

Among all the military prosecutions that took place during the conflict, the case of Clement L. Vallandigham had one of the highest profiles. As a Democratic member of Congress from Ohio and an overt racist, Vallandigham supported the Southern position on slavery and castigated Lincoln's war efforts.[273] Having lost his seat in Congress due to Republican redistricting, Vallandigham planned to run for governor of Illinois on a peace platform.[274]

267. *See generally* Finkelman, *supra* note 264.
268. *See, e.g.*, *Ex parte* Vallandigham, 68 U.S. 243 (1863).
269. Finkelman, *supra* note 264, at 1357–58, 1363.
270. CURTIS, FREE SPEECH, *supra* note 48, at 306.
271. *Id.* at 307.
272. *Id.* at 308.
273. *See id.* at 302–05 (discussing Vallandigham's politics).
274. Michael Kent Curtis, *Lincoln, The Constitution of Necessity, and the Necessity of Constitutions: A Reply to Professor Paulsen,* 59 ME. L. REV. 1, 14–15 (2007) [hereinafter Curtis, Necessity].

General Burnside ordered his arrest in 1863 a few days after Vallandigham delivered a harsh anti-war speech at an Ohio Democratic Party meeting in which he decried the conflict as "wicked, cruel and unnecessary," and denounced Burnside's gag order "as a base usurpation of arbitrary authority."[275] Despite his vitriol, Vallandigham counseled obedience to the laws and urged political solutions to the conflict.[276] Tried by a military commission two days after his arrest, Vallandigham was found guilty under military law and ordered imprisoned for the duration of the war.[277] Lincoln thereafter lifted the prison sentence, but banished him from the Union beyond Confederate lines. After his conviction, Vallandigham sought direct review from the Supreme Court, which declined to reach the merits, reasoning that it had no jurisdiction over military commissions.[278] This provoked a huge outcry, both over Vallandigham's military trial and because his speech fell short of actually instigating disloyal acts.[279] More fuel was poured on the fire the following month after the trial when General Burnside, ignoring a federal court's order, stopped distribution of the *Chicago Times*, a vehemently anti-war newspaper.[280] Claiming to be "embarrassed" by Burnside's action, Lincoln overturned the suppression order.[281]

Assessing the constitutional impact of the Lincoln administration's actions requires considering two separate issues—the use of military commissions and the arrests themselves. Whatever transgressions of the First Amendment occurred, they were compounded by martial law under which the executive both defined the offense and tried suspects under procedures contrary to the Bill of Rights. The best that can be said about Lincoln's handling of dissent was that it occurred in an extraordinary time; it could have been much worse had Lincoln's government not been restrained by an appreciation for free expression, or at least an

275. *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 244–45 (1863).
276. *Id.* at 247.
277. *Id.*
278. *Id.* at 251–52.
279. *See* CURTIS, FREE SPEECH, *supra* note 48, at 320 (discussing the response to Vallandigham's arrest and noting that Vallandigham was not accused of violating any specific statute).
280. *See id.* at 314–17 (discussing General Burnside's order and subsequent public outcry).
281. Letter from Abraham Lincoln to Isaac N. Arnold, (May 25, 1864), *in* LINCOLN, *supra* note 266, at 361.

awareness of the public's expectations. Historian Paul Finkelman writes:

> [W]hat is most surprising is how few actual deprivations of civil liberties took place during the war. For a civil war, when spies and enemy agents were often indistinguishable from the general population, the record of the Lincoln administration seems surprisingly good. Lincoln and those under him were far more sensitive to civil liberties than Woodrow Wilson or Franklin Roosevelt.[282]

Most of the arrests for speech activities during the Civil War took place either in the South or in border states where active resistance was present.[283] Some newspaper editors and other speakers, however, were arrested well away from the scene of revolt.[284] Of greatest importance, is that there was a vigorous opposition press in the North that dogged Lincoln throughout the war.[285] Correspondents observed battles and newspapers reported the horrors.[286]

The comparison of Lincoln's actions to those of Wilson and Roosevelt during the wars of the twentieth century reveals a recurring pattern. To anticipate those episodes, the bottom line is that during times of national crisis, speech and press rights decline as the stakes to public safety rise. When the country is embroiled in total war, as it was under Lincoln, its very existence or at least territorial integrity is at stake. Heavy sacrifices, including the loss of civil liberties, will be demanded by the government. At these times, criticism of government policy is easily linked to harming the war effort. Lincoln perceived hostility to the war as encouraging desertion and draft resistance.[287] Lincoln's conscription program had already produced riots when Vallandigham was arrested.[288] About two months later, serious riots broke out in New York City, where at least a hundred people died as troops put down the

282. Finkelman, *supra* note 264, at 1380.

283. *Id.* at 1377–78.

284. *See generally* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991) (arguing that arrests under Lincoln were not primarily political nor did they usually involve mere opposition speech).

285. Finkelman, *supra* note 264, at 1376.

286. *Id.*

287. *See* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 160–61 (1998).

288. Curtis, Necessity, *supra* note 274, at 15; CURTIS, FREE SPEECH, *supra* note 48, at 301, 320–28.

uprising.[289] Lincoln justified his actions with a simple analogy: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?"[290] Versions of this defense for suppressing speech have appeared periodically in history.[291] It is premised on the assumption that government may protect the "simple-minded" from the persuasion of demagogues, whose messages have maximum destructive impact in times of grave societal crisis. And it assumes that a line can be drawn between condemnation of government policy and inducement to disloyal acts. Lincoln claimed that Vallandigham had been "laboring, with some effect," to frustrate recruitment and encourage desertions.[292] One could certainly imagine that a man listening to Vallandigham's speech would be less likely to enlist and more likely to desert. But any sharp political criticism of the government's policies could have that effect. "Eloquence may set fire to reason," Justice Holmes would later write in a famous 1925 dissent.[293]

After the Civil War, the issue of seditious libel did not result in a ruling from the Court based on the First Amendment until it decided a series of cases during World War I arising out of prosecutions for violations of the Espionage Act of 1917.[294] In the interim, on the occasions when cases presented potential First Amendment issues, the Court was inclined to ignore the arguments or dismiss them summarily.[295] Much the same was true of lower federal courts and state judiciaries.[296] Considerable weight was given by judges to society's legitimate interest in upholding a state's

289. *See generally* IVER BERNSTEIN, THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR (1990); ADRIAN COOK, THE ARMIES OF THE STREETS; THE NEW YORK CITY DRAFT RIOTS OF 1863 (1974).

290. Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), *in* LINCOLN, *supra* note 266, at 454, 460.

291. *See* Curtis, Necessity, *supra* note 274, at 29.

292. *Id.* at 16.

293. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

294. *See, e.g.*, Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919).

295. *See* RABBAN, *supra* note 210, at 131 ("No court was more unsympathetic to freedom of expression than the Supreme Court, which rarely produced even a dissenting opinion in a First Amendment case.").

296. *See id.* at 131 ("Throughout the period from the Civil War to World War I, the overwhelming majority of decisions in all jurisdictions rejected free speech claims, often by ignoring their existence . . . . Most decisions by lower federal courts and state courts were also restrictive.").

police powers against speech that threatened public order or harmed others.[297] Summarizing the era, David M. Rabban concludes:

> The overwhelming weight of judicial opinion in all jurisdictions before World War I offered little recognition and even less protection of free speech interests. . . . A general hostility to the value of free expression permeated the judicial system. . . . Judges often emphasized the sanctity of free speech in the very process of reaching adverse decisions in concrete cases.[298]

Blackstone's "bad tendency test" formed the heart of the judicial approach to free speech in the nineteenth century and well into the twentieth.[299] Justice Holmes' opinion for the Court in a 1907 case, *Patterson v. Colorado*,[300] paraphrased Blackstone to hold that "the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practised by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[301] Holmes took the typical path of judges deciding free expression cases prior to the twentieth century, equating constitutional protections for free speech with the liberties allowed by the common law, such as they were.[302] A scholar of press history, Timothy W. Gleason, writes that "judges recognized constitutional protections, but looked to English common law to determine the meaning and extent of the protection provided under the Constitution."[303] Using the common law, the courts categorized the forms of expression that received no legal protection.[304] Those categories in turn were translated into rules for constitutional decisions.[305] Accordingly, speech would not be constitutionally

297. *See id.* at 132 ("judges gave great deference to the 'police power' of legislators and administrators to determine the tendency of speech.").

298. *Id.* at 175. There are several examples of the Court ignoring or dismissing free speech issues. *See id.* at 131–32, 173–75.

299. *See id.* at 132; Gibson, *supra* note 200, at 307–08.

300. 205 U.S. 454 (1907).

301. *Id.* at 462 (1907) (quoting Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313–14 (1825)).

302. *See* TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH CENTURY AMERICA 42 (1990) (discussing the common law influence on constitutional interpretation).

303. *Id.*

304. *Id.*

305. *Id.* at 41–42.

protected if it amounted to conspiracy, obscenity, indecency, incitement to crime, libel (of various types), commercial speech, and so on, none of which received the common law's favor.[306] At common law, regulating these subjects was an exercise of the state's police powers, which set the boundary between allowable communal authority and individual rights.[307] "The [F]ourteenth [A]mendment to the [C]onstitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control," Justice Edward Douglass White wrote in an 1897 decision upholding a permit requirement for speaking in the Boston Common.[308] These distinctions reveal the judiciary's attitude, as well as that of society generally, toward the balance between conformity to community norms and individual autonomy. In nineteenth-century American rulings, when free expression was at stake, the balance was tipped heavily on the side of state controls.[309]

Obscenity cases illustrate the common law's influence. At common law, obscene publications were illegal.[310] Between 1842 and 1873, Congress enacted a series of statutes aimed at curbing sexual expression, principally by banning its importation as pictures and drawings, forbidding obscene books, pictures and letters from the mails, and outlawing the creation, possession or sale of obscene literature in a federal territory.[311] These statutes allowed for seizure of the offending materials and serious criminal punishment.[312] One of these, the Comstock Act of 1873, was enthusiastically applied by the federal government to forbid the mailing of "every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, or other publication of an indecent character."[313] Another provision suppressed mailing of unsolicited birth control advertisements.[314] A person could be sent to prison for up to ten years "at hard labor" for these offenses, and many did receive substantial sentences.[315] Despite the hundreds of cases

306. *Id.* at 42.
307. *See generally* Davis v. Massachusetts, 167 U.S. 43 (1897).
308. *Id.* at 47.
309. *See id.*
310. GLEASON, *supra* note 302, at 42.
311. *See, e.g.*, Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598 (codified as amended at 18 U.S.C. § 1461 (2000)).
312. *See id.*
313. *Id.*
314. *Id.*
315. *Id.*

brought under these federal statutes and corresponding state laws, the Court did not formulate a definition of obscenity for purposes of setting a constitutional boundary until 1957, in *Roth v. United States* (which in turn was refined by *Miller v. California* in 1973). State prosecutions were untouchable by the Court due to its refusal to apply the First Amendment to the states prior to 1925.[316] As for the Comstock Act, the Court regarded it as a simple exercise of Congress' postal power, similar to prohibiting lottery ads from the mail.[317] No personal liberties were affected by closing the mails to obscenity or lotteries, the Court concluded, since in either case Congress was merely declining to offer "its facilities for the distribution of matter deemed injurious to the public morals."[318]

In one 1896 case, the Court interpreted the Comstock Act to overturn a newspaper editor's conviction.[319] The offending article attacked by name an individual who had opposed certain Populists; here is an excerpt that captures its flavor:

> This black hearted coward is known to every decent man, woman, and child in the community as a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carrion.[320]

Not especially flattering words, but were they "obscene," "lewd, and or "lascivious" as used in the statute?[321] No, the Court held, because these statutory prohibitions "signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel."[322] Admittedly, the Court acknowledged, the article was "exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous," yet it was not "calculated to corrupt and

316. *See generally* Gitlow v. New York, 268 U.S. 652 (1925).

317. *See, e.g.*, Smith v. United States, 431 U.S. 291, 305 (1977) ("[The Comstock Act] was one enacted under Congress' postal power, granted in Art. I,§ 8, cl. 7, of the Constitution, and the Postal Power Clause does not distinguish between interstate and intrastate matters. This Court consistently has upheld Congress' exercise of that power to exclude from the mails materials that are judged to be obscene.").

318. *Ex parte* Jackson, 96 U.S. 727, 736 (1878).

319. Swearingen v. United States, 161 U.S. 446, 450–51 (1896).

320. *Id.* at n.1.

321. *Id.*

322. *Id.* at 451.

debauch the minds and morals of those into whose hands it might fall."[323] "Calculated" at that time could simply mean "likely to," rather than "devised with forethought," and this appears to be the meaning here.[324] The Court in 1896 had held it irrelevant that the defendant did not believe the publication was obscene, and thus did not knowingly act: "[e]very one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious."[325]

By referencing the common law to define obscenity, the Court was following the direction taken by most American judges, federal and state.[326] Specifically, judges relied on a famous 1868 English case, *Regina v. Hicklin*,[327] which invoked the "bad tendency" approach to decide whether a publication was obscene under the common law.[328] According to *Hicklin*, the decisive question to ask was, "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[329] (Notice that the Supreme Court's 1896 case used language parallel to that in *Hicklin* without citing it.) As might be expected, it proved to be a highly subjective standard in practice. Jurors could be instructed, the Court held, that obscenity was "largely a question of your own conscience and your own opinion."[330] Furthermore, by focusing on "those whose minds are open to such immoral influences," *Hicklin* determined obscenity according to the probable effect the material would have on those most likely to be corrupted.[331] (And how would average jurors know that?) Moreover, even if the work as a whole might be considered "serious" literature, isolated passages could condemn it as obscene. A long list of titles suppressed by American courts using the *Hicklin*

323. *Id.*

324. *See* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (discussing nineteenth-century word uses for "calculated").

325. *See* Rosen v. United States, 161 U.S. 29, 41–42 (1896) (illustrating the irrelevancy of defendant's views about the obscenity of a publication).

326. *See id.* at 46.

327. 3 L.R-Q.B. 360 (1868).

328. *Id.* at 366, 369.

329. *Id.* at 371.

330. Dunlop v. United States, 165 U.S. 486, 500 (1897) (quoting the jury instructions given at trial).

331. *Hicklin*, 3 L.R.Q.B. at 371.

standard included Margaret Sanger's birth control pamphlet, *Family Limitations*, D. H. Lawrence's *Lady Chatterley's Lover*, James Joyce's *Ulysses*, Theodore Dreiser's *An American Tragedy*, Aristophanes' *Lysistrata*, Chaucer's *Canterbury Tales*, Boccaccio's *Decameron*, William Defoe's *Moll Flanders*, Tolstoi's *Kreutzer Sonata* and various editions of *The Arabian Nights*.[332] Literally tons of pornography was also suppressed.[333] The *Hicklin* standard slowly lost favor with courts during the twentieth century, but the Court did not formally repudiate it until 1957. The Comstock Act itself was not repealed until 1971.[334]

No sooner than commercial motion pictures were introduced, states and cities began to license their exhibition.[335] Censorship systems were enacted in states and cities across the country, mandating that films be reviewed and approved by authorities before being shown to the public.[336] The Court evinced not the slightest awareness that this might involve a free expression problem. With more conviction than explanation, Justice Joseph McKenna wrote for the Court in 1915 to deny that there was any association between "moving pictures" and free speech: "[w]e immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the

332. *See* H. MONTGOMERY HYDE, A HISTORY OF PORNOGRAPHY 41 (1964) (suppression of *Lysistrata*); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 236 (2007) (suppression of *Lady Chatterley's Lover*, *Ulysses*, and *An American Tragedy*); Daniel M. Cohen, *Unhappy Anniversary: Thirty Years Since Miller v. California: The Legacy of the Supreme Court's Misjudgment on Obscenity*, 15 ST. THOMAS L. REV. 545, 571 n.99 (2003); (suppression of *Canterbury Tales*, *Decameron*, and *Moll Flanders*); David M. Rabban, *The Free Speech League, The ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 57 (1992) (Sanger's *Family Limitations* suppressed); Judith Waxman, *Privacy and Reproductive Rights: Where We've Been and Where We're Going*, 68 MONT. L. REV. 299, 300 (2007); Aaron Zarkowsky, Comment, *The Rico Threat to Artistic Freedoms: An Indirect Consequence of the Anti-Pornography Crusade?*, 5 DEPAUL-LCA J. ART & ENT. L. 81, 89 (1995). *See generally* Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II*, 85 WASH. U.L. REV. 215 (2007) (discussing the application of the *Hicklin* standard to works such as the foregoing).

333. *See* Rabban, *supra* note 332, at 57 ("Comstock bragged in 1913 that he had destroyed 160 tons of obscene literature over the prior forty-one years.").

334. *See* Roth v. United States, 354 U.S. at 488–89 (rejecting *Hicklin* standard for obscenity); RICHARD A. POSNER, SEX AND REASON, 78–80 (1992) (history of Comstock Act).

335. *See* John Wertheimer, *Mutual Film Revisited: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 183–66 (1993).

336. *See id.* at 163–66 (detailing the legislative responses in various state to control the content of theatre production).

multitudinous shows which are advertised on the billboards of our cities and towns . . . ."[337] Among its "familiarly exercised" police powers, the state traditionally was entrusted with "granting or withholding licenses for theatrical performances as a means of their regulation."[338] In brief, this was wholly a question of regulating a commercial practice: "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country, or as organs of public opinion."[339] Furthermore, it was a business with a peculiar potential for harm, McKenna warned, because "a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences."[340] Technically, McKenna was interpreting the free speech clause of the Ohio constitution, but he wrote in generalities that would be applicable if the First Amendment were at issue.[341] Censorship systems for movies remained untouched by the Court until 1952, when it brought movies "within the ambit" of the First Amendment by holding New York's licensing program to be an illegal prior restraint.[342]

Obscenity was merely one subject relating to free expression in which the courts used common law rules to decide cases with constitutional overtones.[343] Although the Court occasionally acknowledged the right of the people to comment on public affairs, it emphasized that the expression could be limited by the state if it was inimical to community values.[344] The exceptions to

337. Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 243 (1915).

338. *Id.* at 244.

339. *Id.*

340. *Id.* at 242.

341. "We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty." *Id.* "We need not pause to dilate upon the freedom of opinion and its expression and whether by speech, writing, or printing." *Id.* at 243. "[T]he police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation." *Id.* at 244.

342. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). New York's board of censors examined films to see if they were "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." *Id.* at 497.

343. *See* RABBAN, *supra* note 210, at 175 ("[F]ilm censorship, political speech by government employees, public sermons by ministers, and newspaper reports of crime also produced decisions that rejected First Amendment claims).

344. *See, e.g.*, Whitney v. California, 274 U.S. 357, 371 n.14 (1927) ("That the

freedom of expression found in common law rules in turn created categories of disfavored speech—expression that could be abridged essentially without restraint by the state.[345] In an 1897 ruling unrelated to free expression, the Court explained that:

> [The Bill of Rights] were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. . . . Thus, the [First Amendment] does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation.[346]

Common law understandings also applied to place certain contexts entirely outside the First Amendment. If the state acted as an employer, a property owner or the provider of a service like the mails, then it could control speech that occurred in these settings because at common law the government possessed the same rights as a private owner or proprietor.[347] As for the mails, the Court held that the government had no obligation to carry what it considered immoral literature.[348] Several cases limited the post office's authority to censor mail, but these were statutory rulings not directly implicating the First Amendment.[349]

freedom of speech which is secured by the Constitution does not confer an absolute right to speak . . . is not open to question"), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("It is a fundamental principle . . . that the freedom of speech and of the press . . . does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.").

345. See *supra* text accompanying notes 302–10 for a delineation of these categories.

346. Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

347. See *infra* notes 348–58, 361–65 for examples of the Court upholding the government's ability to control speech in these private areas.

348. *See, e.g.*, Badders v. United States, 240 U.S. 391, 393–94 (1916) ("The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate."); *Ex parte* Jackson, 96 U.S. 727, 732 (1877) ("The right [of Congress] to designate what shall be carried necessarily involves the right to determine what shall be excluded.").

349. *See, e.g.*, United States v. Chase, 135 U.S. 255 (1890) (holding that the statutory definition of "writing" did not apply to private, sealed letters).

Similarly, a city acting in pursuit of its traditional police powers could impose any conditions it wished on users of municipal property.[350] In the 1897 case previously mentioned as upholding a permit system to speak in the Boston Commons, Justice White affirmed Judge Oliver Wendell Holmes' conclusion for the Supreme Judicial Court of Massachusetts that as the park's owner the city could impose whatever conditions it wished on the use of its property.[351] "The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[352] It made no difference that the mayor had complete discretion over who received a permit, effectively allowing the city to practice viewpoint discrimination.[353]

On a related front, public employees' First Amendment rights were nonexistent, and would remain so for many decades. Again, Judge Holmes articulated the theory for this result, writing in a much-emulated 1892 Massachusetts opinion that upheld the firing of a police officer for engaging in political activities, such as fund-raising for political causes and serving on a political committee.[354] Granting that the officer had "a constitutional right to talk politics," Holmes nevertheless held that he could not claim a "constitutional right to be a policeman. . . . The servant cannot complain, as he takes the employment on the terms that are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control."[355] Holmes's view was widely shared among courts at the time.[356] Whatever else might be a

350. *See supra* notes 337–39 and accompanying text.

351. David v. Massachusetts, 167 U.S. 43, 47 (1897).

352. *Id.* at 48.

353. *Id.* Justice Holmes wrote in the state opinion:

> For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. . . . So it may take the less step of limiting the public use to certain purposes.

Massachusetts v. Davis, 162 Mass. 510, 511 (1895).

354. McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

355. *Id.* at 517–18.

356. *See, e.g.*, Gitlow v. Kieley, 44 F.2d 227, 229–30 (D.C.N.Y. 1930) (citing Justice Holmes' opinion to support denying the plaintiffs a constitutional right to send revolutionary materials through the mail); *In re* Cohen, 159 N.E. 495 (Mass. 1928) (citing Justice Holmes for support in upholding suspension of advertising by members of the bar); Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895) (Holmes, J.).

"reasonable" condition to the Court, controlling employees' speech counted as one of them: "There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract."[357]

Holmes's underlying theory was that government had the same rights as a private employer at common law.[358] For employees, the one advantage of this holding was that government could protect their political independence from the notorious abuses of patronage systems in the nineteenth century.[359] By a law passed in 1876, most federal government employees were "prohibited from requesting, giving to, or receiving from, any other officer or employee of the government any money or property or other thing of value for political purposes."[360] Upholding this enactment, Chief Justice Morrison R. Waite wrote for the Court in the 1882 case, *Ex parte Curtis*, rejecting the contention that this restraint curbed the political independence of a government worker: "[c]ontributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor . . . ."[361] Besides, Waite added, the law was so full of loopholes that it did nothing to prevent employees from contributing directly to political campaigns.[362] That may have been true, but future civil service laws would impose still tighter restrictions on employee political activity.[363] These laws would be upheld on the theory presented by Waite's opinion, that the spoils system in government undermined efficiency and led to padding of payrolls and contracts that in turn were used to finance the political party in power.[364] Employees

357. *McAuliffe*, 29 N.E. at 517–18.

358. *See id.* at 518 ("[T]he city may impose any reasonable conditions upon holding offices within its control. The condition to us seems reasonable, if that be a question open to revision here.").

359. *See* Ronald N. Johnson & Gary D. Libecap, *Courts, A Protected Bureaucracy, and Reinventing Government*, 37 ARIZ. L. REV. 791, 795–96 (1995) (detailing the patronage system and its abuses during this time period).

360. Act of Aug. 15, 1876, ch. 287, § 6, 19 Stat. 143, 169.

361. *Ex parte* Curtis, 106 U.S. 371, 374 (1882).

362. *Id.* at 375.

363. *See supra* note 356 (citing several cases that give examples of these laws).

364. *Ex parte Curtis* was relied on by later cases upholding restrictions on political activities by government workers. *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 555 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75, 96–98 (1947); United States v. Wurzbach, 280 U.S. 396, 399 (1930).

should not object, Waite reasoned, because the scheme was for their own good.[365]

Labor disputes in the private sector were widespread and often violent in pre-World War I America, as unions fought—physically on numerous occasions—to organize and collectively bargain.[366] With strength in numbers, unions could withhold services in order to improve contracts or to obtain them in the first place. Employers had no common law obligation to bargain with unions, and typically refused to do so.[367] To squeeze employers who refused to recognize them, unions engaged in strikes and organized secondary boycotts against suppliers and customers of the targeted companies, at times with the cooperation of other unions.[368] Employers in turn fought back by firing union organizers and members, hiring replacement workers, obliging workers to sign yellow-dog contracts in which they promised not to join a union, and obtaining injunctions against boycotts and strikes.[369] In many instances they hired armed guards to prevent or quell labor disturbances.[370]

Absent protective legislation, organizers had no legal recourse against dismissal for union activity. When legislation favorable to union activities was passed, it risked invalidation as infringing the employers' rights in violation of the Due Process Clause.[371] This

365. *Ex parte Curtis*, 106 U.S. at 374 ("No one can for a moment doubt that in both these statutes the object was to protect the classes of officials and employees provided for from being compelled to make contributions for such purposes through fear of dismissal if they refused.").

366. *See, e.g.*, Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557, 563–71 (1999) (detailing the Industrial Worker's of the World movements in Missouri and San Francisco, the latter of which was the most violent of the IWW campaign).

367. *See* Adair v. United States, 208 U.S. 161, 174 (1908) ("The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.").

368. *See generally* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989) (outlining the history of the labor movement, including the tactics used by labor unions to achieve desired results).

369. *See* RABBAN, *supra* note 210, at 169–73 (detailing labor injunctions during this time); *see also* Atchison, T. & S.F. Ry. v. Gee, 139 F. 582, 584 (C.C.S.D. Iowa 1905).

370. *See* Forbath, *supra* note 368, at 1190.

371. *See* Coppage v. Kansas, 236 U.S. 1, 20–21 (1915) ("[T]he liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employee.").

period was high noon for freedom of contract under the regime of *Lochner v. New York*.[372] Among other things, the Court declared laws banning yellow-dog contracts to be offensive to the rights of both employers and employees to bargain for whatever terms they could.[373]

Further adding strength to the employers' side of the scale, the Court had as early as 1895 endorsed the use of labor injunctions to stop strikes and boycotts, a move that greatly favored employers as well.[374] Some of the labor actions restrained by these injunctions were criminal, as when strikers engaged in violence.[375] The Court also found some labor strikes to be illegal efforts to interfere with interstate commerce in violation of the Sherman Antitrust Act.[376] Other forms of union activity stopped by judicial orders, however, involved traditional types of lawful speech: pickets, parades, posters, newspaper articles, and word of mouth.[377] Courts invoked various justifications to rationalize these orders, such as dealing with threats of violence, stopping union "intimidation" of strikebreakers, and preventing unlawful interference with the employer's business.[378] Some lower courts blocked picketing altogether and others forbade demonstrators from using "opprobrious epithets," such as the words "scab, traitor and unfair."[379] Inasmuch as a labor injunction stopped speech before it occurred, these rulings seemingly violated Blackstone's dictate against prior restraints.[380] Nevertheless, in several cases decided by the Court about labor injunctions, the Justices showed little patience with First Amendment arguments.[381]

372. 198 U.S. 45 (1905).

373. *See Coppage*, 236 U.S. at 25 (giving examples of cases striking laws against yellow-dog contracts); Adair v. United States, 208 U.S. 161, 179–80 (1908).

374. *See generally In re* Debs, 158 U.S. 564 (1895).

375. *See* Bobertz, *supra* note 366.

376. *See, e.g.*, United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922) (recognizing the ability to sue unions under the Anti-Trust Act for disrupting interstate commerce).

377. *See* RABBAN, *supra* note 210, at 170 (discussing the limitations on picketing).

378. *See id.* at 170 ("Courts issued injunctions to forbid various activities of union leaders and their supporters . . . .").

379. *See id.* (citing FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 52, 81, 89–106 (1930)).

380. *See* 4 BLACKSTONE, *supra* note 42, at *150–52; *see also supra* notes 47–48 and accompanying text.

381. *See supra* notes 385–90 and accompanying text.

To place labor activities outside the First Amendment—and Blackstone's admonition—the Court characterized them as "verbal acts," which were "as much subject to injunction as the use of any other force whereby property is unlawfully damaged."[382] An injunction stopping a union-instigated boycott of a company's products, for example, "raises no question as to an abridgment of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage."[383] Injunctions were approved by the Court not only to deal with secondary boycotts and union-sponsored violence, but also peaceful efforts to organize non-union companies.[384]

A 1917 case upheld an injunction requested by a coal mine operator against officials of the United Mine Workers.[385] The order forbade the UMW from organizing nonunion miners who had signed yellow-dog contracts.[386]

> [A]lthough having full notice of the terms of employment existing between plaintiff and its miners, [union representatives] were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into "recognizing the union" at the cost of its own independence.[387]

That the union's activities consisted only of speech was beside the point. Persuading workers to leave their employment was "universally recognized" as a tort, Justice Mahlon Pitney declared.[388] And, he could not help but add, the men who were the subject of these union entreaties were "ignorant foreign-born miners."[389]

Labor injunctions provide a characteristic example of how the common law predilection for property rights and sanctity of contract influenced the Court's entire approach to free expression. Starting from the premise that it was illegal to entice workers to

382. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911).
383. *Id.* at 437.
384. *See infra* notes 385, 388 and accompanying text.
385. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1911).
386. *Id.* at 261–62.
387. *Id.* at 248.
388. *Hitchman Coal & Coke*, 245 U.S. at 252.
389. *Id.* at 246. *See also* Loewe v. Lawlor, 208 U.S. 274 (1908) (citing examples of early cases sustaining injunctions against secondary boycotts); *In re* Debs, 158 U.S. 564 (1895).

strike—because that would interfere with property rights—the speech question evaporated: the speech *was* the illegal action. Calling it a "verbal act" only confuses the issue—all verbalizations are actions. Some crimes can be carried out largely or entirely by speech and writing, yet no First Amendment issues are provoked by their punishment. Among these crimes are a variety of property offenses, including interfering with others' businesses by falsely disparaging their products. Speech rights then vary with the extent of property rights involved, and in the nineteenth century business owners enjoyed substantial leeway in using their possessions.

Reviewing the period from the Sedition Act until World War I, as far as speech and press are concerned, one fact stands out. Of the many cases presenting potential free expression issues during this period, in only a few did the courts acknowledge a free expression argument, and they were almost invariably denied. The Court's attitude on this issue persisted despite more than a 125 years of tumultuous national events that had nurtured an aggressive press and accustomed people to thinking of free speech as a basic right. At first glance, it is remarkable that the Court remained so wedded to the common law approach enunciated by Blackstone. Partly the explanation may be that the Justices received so few cases squarely presenting First Amendment issues, leaving them without the material to work out their own constitutional take on free expression.[390] That assumes, needless to say, that the Court would have taken a different direction had it been given the opportunity. There is reason to doubt this assumption. On the occasions when the Court did confront a free speech issue, its analysis usually was superficial and deferential toward elected officials in their exercise of police powers.[391] Much like the Court's decisions on property regulation in that era, the Justices tended to fixate on what they considered the public interest served by restricting speech.[392] For the Court, speech seemed to occupy no more exalted position in the scheme of personal liberties than the ownership of property.[393] Like property, speech could be limited to serve an overarching societal interest in

390. *See* Bobertz, *supra* note 366, at 637–38 (discussing Brandeis and Holmes's evolution of judicial thought).

391. *See, e.g.*, Schaefer v. United States, 251 U.S. 466, 475–78 (1920) (collecting cases).

392. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 51–52 (1919).

393. *See id.*

public order and the protection of personal reputations (including the reputations of public officials).[394] Aside from occasionally voicing platitudes about the virtues of free expression, the Court never articulated the distinctive value of speech as a counterweight to majoritarian politics.[395] Consequently, when it faced a series of cases during World War I and thereafter in which defendants were charged with seditious advocacy, the Court did not perceive any significant virtue in permitting dissidents to urge resistance to decisions made by elected officials.[396] To the contrary, the public interest was winning a war, one of the highest purposes imaginable. Accordingly, the state's justification for suppressing speech reached its apex.

III. SPEECH RIGHTS DURING WORLD WAR I AND THE "RED SCARE"

On April 6, 1917, the United States declared war on Germany. Prior to entering the conflict, lawyers at the Department of Justice began work on legislation that would enable the federal government to stifle "political agitation" that could affect "the safety of the state."[397] The centerpiece of this effort became the Espionage Act of 1917.[398] Under this law, it was illegal during wartime for anyone to make "false reports or false statements" with the intent to hamper the military effort.[399] More potently, the act made it a crime to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or . . . willfully obstruct the recruiting or enlistment service of the United States. . . ." Violators were subject to imprisonment for up to 20 years and fines of $10,000.[400]

394. *See id.*

395. At least not until Justice Brandeis's concurrence in Whitney v. California, 274 U.S. 357, 376 (1927) ("Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.").

396. *See generally* Bobertz, *supra* note 366.

397. John Lord O'Brian, *Civil Liberty in War Time*, N.Y. State Bar Assoc., Proceedings of the Forty-Second Annual Meeting 275, 277 (1919). O'Brian was the chief of the War Emergency Division of the Department of Justice during World War I.

398. Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (1917).

399. *Id.*

400. *Id.*

In the following year, Congress toughened the Act considerably by adding provisions against seditious advocacy.[401] In addition to making it a crime to attempt obstruction of recruiting or interfere with selling war bonds, the amendment outlawed a wide range of disloyal speech.[402] Using far-reaching language, , Congress banned

> any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States . . . .[403]

The statute went on to proscribe "any language intended to bring" these protected objects "into contempt, scorn, contumely, or disrepute . . . ."[404] Further, it became illegal to use "any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies . . . ."[405] Turning to interference with the production of war matériel, Congress made it a crime to "urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war . . . ." [406] Leaving no bases uncovered, it became a crime to "willfully advocate, teach, defend, or suggest the doing of any of the acts or things" already mentioned, or "by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein . . . ."[407] Finally, the mails could not carry any publication that violated these proscriptions.[408] Postal authorities were given wide discretion to refuse material they considered in violation.[409]

President Woodrow Wilson's administration applied these laws with a vigor that made the enforcers of the Sedition Act of 1798 look like pikers. Attorney General Charles Gregory referred

401. *See* Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918).
402. *See id.*
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *See* United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 416 (1921).

derisively to war opponents in a 1917 speech: "Our message will be delivered to them through the criminal courts all over the land. . . . And, may God have mercy on them, for they need expect none from an outraged people and an avenging government."[410] More than 2000 persons were prosecuted under the Espionage Act, and about half convicted.[411] Lengthy prison sentences were the norm, although most defendants had their sentences commuted after a few years, often on condition that they leave the country.[412] Among those most pursued by the Department of Justice were German-Americans, Socialists, and conscientious objectors. Members of the International Workers of the World (IWW, or Wobblies)) were favorite targets, with more than 180 of them prosecuted in 1918 and 1919.[413] Wobblies were notorious not only because of their participation in violent strikes, but for their repeated street protests, which typically produced mass arrests of IWW members. Following a nationwide raid of IWW offices around the country in 1917, 101 of the union's officials were charged with obstructing the war effort.[414] After a five-month trial in Chicago, the longest in American history at that point, all were convicted.[415] The jury completed its deliberations on all 101 cases in under an hour. William D. (Big Bill) Haywood, the IWW national leader, and 14 others were sentenced to twenty years; 68 received five to ten years, and the remainder lighter terms.[416] Trials in Wichita and Sacramento convicted another eighty Wobblie leaders. (Big Bill avoided prison by jumping bond and decamping to Russia, where he died in 1928.)[417]

410. *All Disloyal Men Warned by Gregory*, N.Y. TIMES, Nov. 21, 1917, at 3.

411. *See* HENRY SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917-1921, at 46–47 (1960) (reporting that 2168 individuals were prosecuted and 1055 were convicted).

412. *Id.*

413. Paul L. Murphy, *Sources and Nature of Intolerance in the 1920s*, 51 J. AM. HIST. 60, 63 (1964).

414. *See* David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055, 1062-64 (1994) (detailing IWW street demonstrations and arrests). Rabban notes that these arrests produced no appellate precedents. *See id.* at 1061. *See also* Patrick Renshaw, *The IWW and the Red Scare 1917-1924: From War to Peace*, 3 J. CONTEMP. HIST. 63, 66–68 (1968) (describing government actions to suppress IWW).

415. *Id.*

416. *Id.*

417. *Id. See also* JOSEPH R. CONLIN, BIG BILL HAYWOOD AND THE RADICAL UNION MOVEMENT 196–99, 208 (1969).

Notwithstanding considerable opposition to the war among portions of the populace, the period from 1917 to 1920 was marked by "[a] wave of xenophobia and super-patriotism . . . . Reds, radicals, foreigners, and dissenters of all kinds were harried, persecuted, prosecuted, and deported . . . ."[418] Juries showed scant regard for those who spoke out against the war at a time when troops were in the trenches. Judge Charles Fremont Amidon, a federal district judge in North Dakota, described the temper of juries in these prosecutions:

> Only those who have administered the Espionage Act can understand the danger of such legislation. When crimes are defined by such generic terms . . . the jury becomes the sole judge, whether men shall or shall not be punished. Most of the jurymen have sons in the war. They are all under the power of the passions which war engenders. [Typically] sober, intelligent business men . . . looked back into my eyes with the savagery of wild animals, saying by their manner, "Away with this twiddling, let us get at him." Men believed during that period that the only verdict in a war case, which could show loyalty, was a verdict of guilty.[419]

These prosecutions, keep in mind, were for speaking or writing against American involvement in the war, not espionage or sabotage. In no case did the government prove that a defendant actually had impaired the country's military agenda. It did not have to do so in order to convict under the Espionage Act.[420] Virtually all of the prosecutions accused dissidents of *attempting* to interfere with the war effort by speaking or writing against it or the military draft. Federal judges almost uniformly interpreted the act to punish anti-war speech that had a "bad tendency" to incite others to violate the Act. The question to ask, one federal circuit court held in a typical opinion, was "whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by the statute."[421] Juries were given wide latitude by judges to determine if the defendant's words had such a tendency, and to decide the related issue of whether the defendant intended that the words would lead

418. Renshaw, supra note 414, at 65–66.

419. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 76–77 (1920) (quoting Judge Amidon, who had much experience in Espionage Act cases).

420. Sedition Act, ch. 75, 40 Stat. 553 (1918).

421. Shaffer v. United States, 255 F. 886, 887 (9th Cir. 1919).

to an illegal action.[422] On the latter question, courts greatly aided the prosecution by holding that the defendant "must be presumed to have intended the natural and probable consequences of what he knowingly did."[423] This presumption left juries to speculate on, say, whether an inflammatory leaflet might diminish enthusiasm for enlistment or cause troops to desert.[424] If jurors thought it might, then the defendant presumably had that intent, making the test meaningless as a check on zealous prosecutions of unpopular opinions.[425] Few verdicts were overturned on appeal.[426]

There is a striking similarity between some of these prosecutions and the suppression of Civil War copperheads by executive and military action. As then, the main targets of prosecutions were those who sharply criticized the country's continued involvement in the conflict. It was easy for judges and juries to connect the dots between criticism and impeding the war struggle, just as Lincoln's administration had done. Explaining why critical words could be proscribed, one trial judge in World War I opined that "[t]he service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country."[427] In the case that gave rise to this remark, the defendant had been convicted of mailing a book that cast doubt on the wisdom of the war, using combustive rhetoric such as this: "There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khakicoat in the trenches."[428] Many other cases of similar dimension could be mentioned.[429] Geoffrey Stone, a First Amendment scholar, gives a few more examples of Espionage Act convictions:

> Rose Pastor Stokes, the editor of the socialist Jewish Daily News, was sentenced to ten years in prison for saying "I am for the people, while the government is for the profiteers"

422. RABBAN, *supra* note 210, at 257–60.
423. *Shaffer*, 255 F. at 889.
424. RABBAN, *supra* note 210, at 257–60.
425. *Id.*
426. Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model that Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 488 n.50 (2007).
427. *Shaffer*, 255 F. at 888.
428. *Id.* at 886.
429. *See* RABBAN, *supra* note 210, at 257–60.

> during an antiwar statement to the Women's Dining Club of Kansas City. D. T. Blodgett was sentenced to twenty years in prison for circulating a leaflet urging voters in Iowa not to reelect a congressman who had voted for conscription and arguing that the draft was unconstitutional. The Reverend Clarence H. Waldron was sentenced to fifteen years in prison for distributing a pamphlet stating that "if Christians [are] forbidden to fight to preserve the Person of their Lord and Master, they may not fight to preserve themselves, or any city they should happen to dwell in."[430]

In March 1919, several months after the fighting had ended in Europe, and while the terms of peace were being negotiated in Paris, Justice Oliver Wendell Holmes included a confidential aside in a letter to his friend Harold Laski: "The federal judges seem to me . . . to have got hysterical about the war."[431] Holmes appeared genuinely unaware that he had contributed to the frenzy by his actions in the prior two weeks, during which the Court decided its first three Espionage Act cases.[432] Holmes wrote for unanimous Courts upholding the convictions in all of them.[433] Actually this was not the Court's first encounter with speech issues related to the war. Already in the previous year it had affirmed convictions under the Selective Draft Act for speaking against conscription, on the theory that the speeches could encourage draft evasion.[434] One of those involved the famed anarchist Emma Goldman, a Russian immigrant to America who had lambasted the government and bourgeois society for 30 years.[435] She would spend 20 months in federal prison before exchanging her liberty for permanent deportation.[436] Goldman's biographer, Alice Wexler, gives this

430. United States v. Waldron (unreported) (D. Vt. 1918), *quoted in* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 421 (2004) (citing several Espionage Act examples).

431. Letter from Oliver Wendell Holmes to Harold J. Laski (March 16, 1919), *in* 1 HOLMES-LASKI LETTERS 142 (Mark DeWolfe Howe ed., 1963).

432. *See id.* at 142 n.2.

433. *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211, 212 (1919). A fourth case, decided March 3, 1919, upheld an Espionage Act conviction for speaking against the draft, but Justice Brandeis' opinion did not decide a constitutional issue. *See* Sugarman v. United States, 249 U.S. 182, 185 (1919);

434. *See* Goldman v. United States, 245 U.S. 474 (1918); Kramer v. United States, 245 U.S. 478 (1918).

435. *See generally* ALICE WEXLER, EMMA GOLDMAN: AN INTIMATE LIFE (1984).

436. *Id.*

précis of a woman who "enjoyed a notoriety unequalled by any other woman in American public life."[437]

> On her freewheeling coast-to-coast lecture tours she defended everything from free speech to free love, from the rights of striking workers to the rights of homosexuals. Her name became a household word, synonymous with everything subversive and demonic, but also symbolic of the "new woman" and of the radical labor movement that blossomed in the years before World War I. To the public she was America's arch revolutionary, both frightening and fascinating. She flaunted her lovers, talked back to the police, smoked in public, and marched off to prison carrying James Joyce's *Portrait of the Artist* under her arm.[438]

Neither Goldman nor her co-defendants pressed First Amendment issues, however, and the Court treated the other arguments almost summarily.[439] They mainly attacked the constitutionality of the draft, which the Court had already upheld in 1917, when it declared that notwithstanding the ban on involuntary servitude in the Thirteenth Amendment, "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it."[440] If one could be drafted without violating his liberties, then perforce it should be constitutional to punish someone for merely interfering with conscription. After all, the draft was justified as an exercise of Congress' war powers.[441]

The first in the triptych of 1919 cases involved Charles T. Schenck, the general secretary of the Socialist Party at the outset of World War I.[442] He and Elizabeth Baer, a member of the party's executive committee, were convicted of violating the Espionage Act for arranging to mail or distribute several thousand leaflets to men who were eligible to be drafted.[443] Using language that Holmes would describe as "impassioned," their two-sided circular mainly constituted a diatribe against the war and the draft.[444] Attributing

437. *Id.* at xv.
438. ALICE WEXLER, EMMA GOLDMAN IN EXILE: FROM THE RUSSIAN REVOLUTION TO THE SPANISH CIVIL WAR 1 (1989).
439. Selective Draft Law Cases, 245 U.S. 366, 390 (1918).
440. *Id.* at 378.
441. *Id.* at 377.
442. Schenck v. United States, 249 U.S. 47, 49 (1919).
443. *Id.* at 49–50.
444. *Id.* at 51.

the "the horrors of the present war in Europe" to the work of "Wall Street's chosen few," it vigorously railed against "forc[ing] the youth of our land into the shambles and bloody trenches of war-crazy nations . . . ."[445] After charging that conscription violated the Thirteenth Amendment, the only specific action that it recommended was for recipients of the message to "join the Socialist Party in its campaign for the repeal of the conscription act."[446] More vaguely, it admonished readers to "Assert Your Rights."[447] Holmes acknowledged that this plea had not ventured beyond urging a change in the law, but nonetheless the defendants were guilty of attempting to interfere with recruiting and enlistment: "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point."[448]

Turning to the First Amendment, Holmes began by retreating from his previous declaration in *Patterson v. Colorado*, that freedom of expression was co-extensive with Blackstone's formulation: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints . . . ," Holmes now conceded.[449] Having taken that tentative step, he went on to "admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."[450] Context was critical:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create *a clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not

445. 1919 WL 20713 at *5–6 (brief for the United States), *cited in Schenck*, 249 U.S. at 53.
446. *Id.* at *5.
447. *Id.*
448. *Schenck*, 249 U.S. at 51.
449. *Id.*
450. *Id.* at 52.

> be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[451]

The phrase "clear and present danger" was new for the Court, as was the analogy Holmes drew to elucidate its import: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[452] Both were destined to become among the most-remembered statements from the Court, and both would prove to be overly simplistic in analyzing free speech controversies.

One week after *Schenck*, the Court upheld Espionage Act convictions in *Frohwerk v. United States*[453] and *Debs v. United States*.[454] Jacob Frohwerk received a ten-year sentence for a series of insistently anti-war articles he had published in a Missouri-based German-language newspaper.[455] Unlike the leftist leaflet in *Schenck*, these writings had a distinctly pro-German point of view, the readership coming from the sizeable population of German immigrants and their descendants in the Midwest.[456] Although not directed specifically at draftees or potential recruits, as in *Schenck*, the writings could be interpreted as urging civil disobedience.[457] According to Holmes' description, the articles "said that the previous talk about legal remedies is all very well for those who are past the draft age and have no boys to be drafted."[458] Considering the dreadfulness of the war and the awful fate awaiting soldiers, Frohwerk posed a rhetorical question: "Who then, it is asked, will pronounce a verdict of guilty upon him if he stops reasoning and follows the first impulse of nature: self-preservation."[459] (Answer: more than a few juries.) Holmes parsed these words from the perspective established in *Schenck*, that while Frohwerk's publications might have been protected in more tranquil times, given the ongoing conflict it was "impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that

451. *Id.* (emphasis added).
452. *Id.*
453. 249 U.S. 204 (1919).
454. 249 U.S. 211 (1919).
455. *Frohwerk*, 249 U.S. at 205–08.
456. *See Schenck*, 249 U.S. at 49–50 (noting that Schenck was the general secretary of the Socialist Party and the leaflets at issue were for promotion of Socialist ideas); *Frohwerk*, 249 U.S. at 210.
457. *Schenck*, 249 U.S. at 48–49; *see also Frohwerk*, 249 U.S. at 205–06.
458. *Id.* at 207.
459. *Id.* at 208.

the fact was known and relied upon by those who sent the paper out."[460]

Eugene Debs had more than a little breath, and a rousing speech he gave in Canton, Ohio during 1918 earned him two concurrent ten-year prison sentences for violating the Espionage Act.[461] A figure of considerable notoriety, Debs already had run for President four times as the Socialist Party candidate.[462] In the 1920 election, in which he campaigned from federal prison, Debs finished third, receiving over 900,000 votes out of about 27 million cast.[463] Holmes himself referred to Debs in private as "a noted agitator."[464] A picture of Debs delivering the Canton address shows a mostly bald man in a three-piece suit with a bow tie on a stage festooned with American flag bunting.[465] He is leaning forward and speaking with full throat, pumping his left arm vigorously.[466] Debs' Canton speech was primarily about "Socialism, its growth, and a prophecy of its ultimate success."[467] As to that, "we have nothing to do," Holmes maintained, true to his view that the Constitution did not establish a preferred economic system.[468] Debs violated the Espionage Act's for what he said about the war and the draft.[469] Depicting the war as part of the class struggle between workers and plutocrats, Debs exhorted, "you need to know that you are fit for something better than slavery and cannon fodder. . . . Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves."[470] Praising three individuals by name who had been convicted of obstructing the draft or recruitment, Debs cautioned that "he had to be prudent and might not be able to say all that he thought."[471] Holmes thought Deb's coyness suspicious—"intimating to his hearers that

460. *Id.* at 209.
461. *Debs*, 249 U.S. at 212.
462. *See Eugene V. Debs*, TIME, Nov. 1, 1926.
463. ANN HAGEDORN, SAVAGE PEACE 427 (2007).
464. Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 5, 1919), *in* 2 HOLMES-POLLOCK LETTERS 7 (Mark DeWolfe Howe ed., 1941).
465. See the cover of NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST (1982).
466. *Id.*
467. *Debs,* 249 U.S. at 212.
468. *Id.* at 212–13.
469. *Id.*
470. *Id.* at 214.
471. *Id.* at 213.

they might infer that he meant more."[472] Sealing his fate, Debs had added proudly: "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone."[473] From all this, Holmes concluded, the jury could reasonably find "that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting."[474] That Debs intended to obstruct the draft could be inferred by the jury from the words in the speech.[475]

There was no evidence that the defendants' actions in these three cases had any effect whatsoever on the draft, recruiting or military discipline. That was irrelevant, Holmes explained in *Schenck*, because the crime charged was a conspiracy to *attempt* to obstruct the draft, and therefore "we perceive no ground for saying that success alone warrants making the act a crime."[476] About a month after the case was decided, Holmes acknowledged to the noted English legal historian Sir Frederick Pollock, that there had been "a lot of jaw about free speech" in *Schenck*, "which I dealt with somewhat summarily."[477] To Holmes, the question in the case involved a straightforward problem of criminal attempt, an issue that he had encountered repeatedly during 20 years as a state court judge.[478] Attempts to commit crimes were punishable, Holmes had written in his 1881 book, *The Common Law*, because of the danger they presented to the community.[479] Determining whether an attempted crime had been committed involved weighing "nearness of the danger, the greatness of the harm, and the degree of apprehension felt."[480] That formula was developed for ordinary criminal cases—for example, a person could be found guilty of attempted murder by firing a gun at another and missing the intended target. Applied to a speech case, however, it assigned no special weight to the value of speech, and in wartime there was

472. *Id.*
473. *Id.* at 214.
474. *Id.* at 215.
475. *Id.* at 214–15.
476. Schenck v. United States, 249 U.S. 47, 52 (1919).
477. Letter from Oliver Wendell Holmes to Frederick Pollock (April 5, 1919), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 464, at 7.
478. *Id.*
479. OLIVER WENDELL HOLMES, THE COMMON LAW 67–69 (1881).
480. *Id.*

plenty of heft on the other side of the scale.[481] Two months after the three decisions, Holmes wrote in a letter: "When people are putting out all their energies in battle I don't think it unreasonable to say we won't have obstacles intentionally put in the way of raising troops—by persuasion any more than by force."[482] That came from a former soldier who had been seriously wounded three times during the Civil War—at Antietam, Ball's Bluff, and Chancellorsville.[483]

A strange case in 1915 produced an opinion from Justice Holmes in which he articulated his view that speech could be punished as an attempt to incite others to illegal acts.[484] The decision was *Fox v. Washington*, and it arose from the travails of a nudist colony that enjoyed communing with nature in the Northwest forests.[485] After some strait-laced local citizens objected, which led to the arrest of four members of the group for public indecency, a small county newspaper named the *Agitator* published an article titled the "The Nude and the Prudes."[486] Its author, Jay Fox, not only praised the benefits of nudism, but threatened a boycott against the "prudes" who had caused the arrests.[487] Fox was convicted under a statute making it a crime to willfully encourage another person to violate the law; he received two months in jail.[488] According to the Washington Supreme Court, Fox "concedes that the article does tend to encourage disobedience and disrespect for law," and then added, "it clearly does so."[489] (What author would concede otherwise? Confess that his or her work had no impact whatsoever?) Evidence was introduced at trial to show that nudism had increased after the publication, which the Washington court thought probative of the article's effect.[490] Fox argued that the law

481. Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 217 (1994); David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 154–58 (1982).

482. Letter from Holmes to Herbert Croly (May 12, 1919), *in* 1 HOLMES-LASKI LETTERS, *supra* note 431, at 153.

483. *See* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870, at 99–100 (1957) (explaining Holmes' wartime injuries at Ball's Bluff), 126–129 (explaining his injuries at Antietam), 154–55 (explaining his injuries at Chancellorsville).

484. Fox v. Washington, 236 U.S. 273, 277–78 (1915).

485. *Id.* at 276.

486. *Id. See also* State v. Fox, 71 Wn. 185, 186, 127 P. 1111, 1112 (Wash. 1912).

487. *Fox*, 236 U.S. at 276–77.

488. *Fox*, 71 Wn. at 186, 127 P. at 1112.

489. *Id.*

490. *Id.* at 1113.

was unconstitutional because it "it abridges the right of free speech and of the press."[491] His efforts found no favor with Justice Holmes or the eight others on the Court.[492] It is unclear from the reported opinions what Fox admitted to instigating. Nudism? An illegal boycott? Whatever the crime, or its seriousness, it made no difference to Holmes. "In this present case," Holmes wrote, "the disrespect for law that was encouraged was disregard of it,—an overt breach and technically criminal act."[493] Holmes took the extra step, unnecessary to the decision, of saying that "it does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general."[494] Applied to the Espionage Act cases, speech could be punished because it had a tendency to incite disobedience of the law.[495]

At the time *Schenck*, *Debs,* and *Frohwerk w*ere decided, a momentous year already was underway. While the terms of peace were being negotiated in Paris, the United States was in the midst of a year or more of widespread labor strikes. Thousands of strikes occurred in 1919, involving over four million workers, about one out of five of the workforce.[496] Seattle underwent a general strike for five days in February, idling tens of thousands of workers.[497] A police strike in Boston during September, occasioned by a refusal of the city to recognize a police union, produced two days of looting, rioting and killing.[498] J. Edgar Hoover, the head of the Department of Justice's General Intelligence Division, asserted that at least half of the nation's strikes were attributed to the Communist organizations.[499] Bolshevism, which had triumphed in Russia in the fall of 1917, appeared to be spreading throughout eastern and central Europe.[500] Communist and anarchist groups were active in the United States, publishing dozens of new periodicals, and they were blamed by leading officials as the source

491. *Id.* at 1112.
492. *See Fox*, 236 U.S. at 278.
493. *Id.* at 277.
494. *Id.*
495. *See id.*
496. *See* William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v United States*, 2001 SUP. CT. REV. 375, 388 (2001).
497. ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1910-1920, at 57–64 (1955).
498. *Id.* at 122–28.
499. *Palmer Denies Use of Provocateurs*, N.Y. TIMES, Apr. 25, 1920, at 23.
500. Wiecek, *supra* note 496, at 387.

of labor unrest.[501] Economically, the country was in a severe post-war slump caused by an end to military-related production, yet prices for basic goods continued to rise. Prominent officials in the national government warned that the country stood on the precipice of revolution. Attorney General A. Mitchell Palmer asserted in 1920 that "[l]ike a prairie fire, the blaze of revolution was sweeping over every American institution of law and order a year ago."[502]

A wave of nativism simultaneously hit the nation, as Americans blamed the some ten million immigrants who had landed from southern and eastern Europe during the prior 15 years for the social and economic unrest.[503] "One hundred percent Americanism" was the official catchphrase of the day.[504] As Palmer explained, "I am myself an American and I love to preach my doctrine before undiluted one hundred percent Americans, because my platform is, in a word, undiluted Americanism and undying loyalty to the republic."[505] Press releases emphasized that the memberships of radical organizations were heavily weighted with aliens.[506] Editorial cartoons appearing in papers across the land depicted the stereotypical anarchist as an unkempt, swarthy-looking character with wild whiskers on a deranged face, often with a bomb in hand.[507]

Tensions rose even higher when it was discovered in May 1919 that thirty-six package bombs had been mailed to prominent Americans, including the likes of John D. Rockefeller, Attorney General Palmer, and Justice Holmes.[508] Many of the explosives were intercepted in the mail, but one severely injured the housekeeper of a U.S. Senator.[509] Then, on June 2, bombs

501. *Id.* at 384–92.

502. A. Mitchell Palmer, *The Case Against the Reds*, Forum, Feb. 1920, at 173–76, *reprinted in* THE FEAR OF CONSPIRACY 226 (David Brion Davis ed., 1971).

503. Murphy, *supra* note 413, at 60. *See also* Stanley Coben, *A Study in Nativism: The American Red Scare of 1919-20*, 79 POL. SCI. Q. 52 (1964) (expounding on the radicalism of 1919-1920 and the rise of anti-immigrant feelings); Renshaw, *supra* note 414.

504. Wiecek, *supra* note 496, at 385–86.

505. A. Mitchell Palmer, ATLANTA CONST., Apr. 7, 1920, *reprinted in* Coben, *supra* note 503, at 73.

506. Coben, *supra* note 503, at 68–69.

507. *See A. Mitchell Out for a Stroll*, CHICAGO TRIBUNE, May 4, 1929, *reprinted in* STANLEY COBEN, A. MITCHELL PALMER, POLITICIAN 237 (1963).

508. MURRAY, *supra* 497, at 71.

509. *Id.* at 70–71.

exploded in eight U.S. cities, killing two.[510] A bomb destroyed the front of Attorney General Palmer's house, blowing at least one bomber to bits in the process.[511] A pamphlet was found in Palmer's yard connecting the attack to "The Anarchist Fighters," and containing the chilling message: "There will have to be bloodshed; we will not dodge; there will have to be murder; we will kill . . . there will have to be destruction; we will destroy . . . . We are ready to do anything and everything to suppress the capitalist class."[512] William J. Flynn, the director of the Justice Department's Bureau of Investigation, stated soon afterwards that the bombings were "connected with Russian Bolshevism, aided by Hun money," and that the "anarchists [were] operating and spreading their propaganda under the guise of labor agitation."[513] At noon on September 16, 1920, a powerful bomb exploded in a horse cart parked outside the J.P. Morgan & Company on Wall Street in the heart of the New York financial district—"the precise center, geographical as well as metaphorical, of financial America and even the financial world."[514] Thirty persons died on the scene and ten more succumbed later; hundreds were injured.[515] Visitors to Wall Street can to this day see the exterior of the J.P. Morgan building pockmarked with holes from the blast.[516] Until the Oklahoma City bombing in 1995, the Wall Street attack was the worst terrorist bombing in American history.[517] No one was ever convicted, but as the New York Times reported a day later, "Federal, State and city authorities were agreed that the devastating blast signaled the long-threatened Red outrages."[518] Minutes before the blast, circulars were placed in the mail a block away, reading: "Remember / We will not tolerate / any longer / Free the political / prisoners or it will be / sure death for all of you / American Anarchist Fighters."[519] Nine days later, on September 25, Woodrow Wilson suffered a

510. *Id.* at 78.
511. *Id.* at 78–79.
512. *Id.* at 79 (omission in reprint).
513. Coben, *supra* note 503, at 60; REGIN SCHMIDT, RED SCARE: FBI AND THE ORIGINS OF ANTICOMMUNISM IN THE UNITED STATES, 1919-1943, at 150 (2000).
514. JOHN BROOKS, ONCE IN GOLCONDA: A TRUE DRAMA OF WALL STREET 1920-1938, at 1 (1969).
515. *Id.* at 2.
516. *See generally* Nathan Ward, *The Fire Last Time: When Terrorists First Struck New York's Financial District*, 52 AM. HERITAGE 46 (Nov.-Dec. 2001).
517. *Id.*
518. *Red Plot Seen in Blast,* N.Y. TIMES, Sept. 17, 1920, at A–1.
519. BROOKS, *supra* note 514, at 11.

catastrophic stroke while traveling the country on his futile tour to urge ratification of the League of Nations.[520]

America was in the throes of what became known as the Red Scare.[521] In hindsight, it was a period of untempered panic. No evidence emerged to prove that the violence was anything more than the exertions of a tiny number of extremists. Understandably, however, the government at the time could not assume the attacks were isolated incidents, or the work of a few. President McKinley had been assassinated in 1901 by a self-professed anarchist, who purportedly was moved to act after hearing Emma Goldman speak.[522] Memories of the Haymarket bombings of 1886, also blamed on anarchists, had not faded.[523] Bombings in general were not unusual in that era of widespread social unrest and violent relations between labor unions and companies. Vigorous response may have been needed, but Attorney General Palmer was less than level-headed, as he was convinced that "vast organizations . . . were plotting to overthrow the government."[524]

On November 7, 1919 (the second anniversary of the Russian Revolution), the soon-to-be notorious "Palmer Raids" began.[525] Federal agents arrested 250 people in 11 cities and summarily deported them.[526] In December, Emma Goldman was taken to Ellis Island, placed by U.S. Marines on a ship with 243 others who had been declared "dangerous reds," and packed off to Russia.[527] Gen. Leonard Wood, a well-known military figure from his days as a Rough Rider with Theodore Roosevelt in the Spanish-American

520. Ward, *supra* note 516, at 46.

521. *See* COBEN, *supra* note 507, at 196–216; *see also* DONALD O. JOHNSON, THE CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION 119–148 (1963); SCHEIBER, *supra* note 411, at 52-58. *See generally* W. ANTHONY GENGARELLY, DISTINGUISHED DISSENTERS AND THE OPPOSITION TO THE 1919-1920 RED SCARE (1996); JULIAN J. JAFFEE, CRUSADE AGAINST RADICALISM: NEW YORK DURING THE RED SCARE, 1914-1924 (1972); MURRAY, *supra* note 497; H.C. PETERSON & GILBERT C. FITE, OPPONENTS OF WAR, 1917-18 (1957); WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS 1903-1933 (2d ed. 1994).

522. Leroy Parker, *The Trial of the Anarchist Murderer Czolgosz*, 11 Yale L.J. 80, 87 (1901).

523. *See* Rabban, *supra* note 198, at 519.

524. Palmer, *supra* note 502, at 226.

525. *See* Coben, *supra* note 503, at 217-45; *see also* MURRAY, *supra* note 497, at 210–22; PRESTON, *supra* note 521, at 208–37; Renshaw, *supra* note 414, at 69.

526. MURRAY, *supra* note 497, at 196–98.

527. Herbert Mitgang, *Book of the Times: Emma Goldman, Queen of Causes*, N.Y. TIMES, Oct. 14, 1989, § 1, p. 16.

War, and then a leading candidate for the Republican presidential nomination in 1920, declared that the radicals "should be put on a ship of stone with sails of lead and their first stopping place should be hell."[528]

Two months later, in a second set of raids, around 3,000 individuals were arrested in many cities, along with seizures of "[a]ll literature, books, papers and anything hanging on the walls" in their premises.[529] In thousands of these cases, no arrest or search warrants were obtained.[530] The object evidently was not prosecution, but deportation of those with communist ties. Most of the targets of these actions were thought by federal officials to be members of the Communist Party of America and the Communist Labor Party, both heavily comprised of non-citizens, principally immigrants from southern and eastern Europe and Russia.[531] "Virtually every local Communist organization in the nation was affected; practically every member of the movement, national or local, was put under arrest."[532] "Federal agents stormed into every Communist (and many a non-Communist) meeting house in the nation and arrested everyone, citizens and aliens, Communists and non-Communists . . . and then tore the meeting houses apart."[533] Aliens were tried in administrative deportation proceedings under legislation specifically targeting noncitizen anarchists, which the Court had upheld in a 1904 ruling, or under the Anarchist Exclusion Acts of 1918 and 1920, which authorized expulsion of anarchists and their ideological sympathizers.[534] Agitators with American citizenship were referred to state officials for prosecution under their syndicalism laws.[535] Palmer announced that he was "sweeping the nation clean of such alien filth," although in the end only several hundred of those detained were deported.[536]

528. *Id.*

529. Instructions from Department of Justice to U.S. Attorneys, Dec. 27, 1919, *quoted in* COBEN, *supra* note 507, at 226.

530. *Id.* at 227.

531. *Id.* at 223.

532. MURRAY, *supra* note 497, at 213.

533. JOHNSON, *supra* note 521, at 141.

534. United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 74 (2003); *Developments in the Law Immigration and Nationality*, 66 HARV. L. REV. 643, 687–88 (1953).

535. MURRAY, *supra* note 497, at 213. With the war over, the statutory bases for federal prosecution of radicals diminished.

536. Palmer, *supra* note 505, at 227; Ngai, *supra* note 534, at 74.

Nevertheless, the raids had "a devastating effect on the domestic radical movement."[537]

Three days after the first of the Palmer Raids, which had been greeted with widespread public approbation, the Court handed down its next Espionage Act decision, *Abrams v. United States*,[538] a case that had been argued less than three weeks earlier. Justice John H. Clarke, a progressive Democrat appointed by Wilson, authored the majority opinion upholding sentences of up to twenty years for Jacob Abrams and four other Russian-born anarchists.[539] Justice Clarke noted gratuitous biographical details about the defendants: "All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization."[540] These were not one-hundred percent Americans. But they were smart enough to be dangerous. Their offense consisted of distributing a few thousand copies of two leaflets in New York City (one in Yiddish)—many were delivered airborne by tossing them out windows.[541] Although this activity took place during the war, the target of their jeremiad was American military intervention on behalf of the White armies fighting Russian Bolsheviks.[542] Using militant Marxist rhetoric throughout, they condemned Wilson as "too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.'"[543] Another piece, written in Yiddish, exhorted: "Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom."[544] Much of the prose seemingly came straight from a treasury of Bolshevik slogans and platitudes:

> The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!' 'Yes

537. MURRAY, *supra* note 497, at 220.
538. 250 U.S. 616 (1919).
539. *Id.* Originally six were arrested, but one died in police custody, allegedly from beatings. *See* Frederick M. Lawrence, *The Coastwise Voyager and the First Amendment: The Fighting Faiths of the Abrams Five*, 69 B.U. L. REV. 897, 906 n.36 (1989).
540. *Id.* at 617.
541. *Id.* at 618–21.
542. *Id.* at 620–25.
543. *Id.* at 620.
544. *Id.* at 621.

> friends, there is only one enemy of the workers of the world and that is CAPITALISM.'. . .
>
> We, the toilers of America, who believe in real liberty, shall pledge ourselves, in case the United States will participate in that bloody conspiracy against Russia, to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia.'. . .
>
> 'Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that not only the Russian Worker fights for freedom, but also here in America lives the spirit of Revolution.'"[545]

Justice Clark surmised that "[t]his is clearly an appeal to the 'workers' of this country to arise and put down by force the government of the United States."[546] Surely, he wrote for the majority, the defendants' purpose was to deflate patriotism and thereby discourage assistance for the war.[547] By calling for a general strike, "The Rebels" (as they named themselves) must have wanted to paralyze the nation, with the consequence of halting munitions productions. "The plain purpose of their propaganda was to excite, at the *supreme* crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe."[548] It did not matter that The Rebels were trying to stop American intervention in Russia, or that they denounced the Germans and the Allies with equal vigor, for Clark responded that the only question was the probable effect of their writings. The defendants' actual knowledge of probable effects was inferred:

> Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States.[549]

545. *Id.* at 620–23 (emphasis omitted).
546. *Id.* at 620.
547. *Id.*
548. *Id.* at 623 (emphasis added).
549. *Id.* at 621.

Abrams made merely a mention of the defendants' First Amendment arguments.[550] Clark dismissed the issue with a virtual wave of his hand: "This contention is sufficiently discussed and is definitely negatived in Schenck," and that was it.[551] Absent from the Court's analysis was any discussion of whether the leafleting affected the war effort in the slightest. There was barely any allusion to Holmes' "clear and present danger" formula (for that matter, Holmes himself had not relied on it in *Frohwerk*).[552] Abrams and the other defendants were members of a group of about a dozen men and women, all young, who had immigrated from Eastern Europe or Russia. At trial, three of them testified "that they were 'rebels,' 'revolutionists,' 'anarchists,' that they did not believe in government in any form, and they declared that they had no interest whatever in the government of the United States."[553]

By themselves, the defendants in *Abrams* were unlikely to overthrow the government. That was beside the point to the Court. They had sent out their circulars "in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas."[554] Their aim, the Court thought, was something other than provoking a rational exchange of ideas about public policy. It was to instigate revolt. "This is not an attempt to bring about a change of administration by candid discussion," Clark reminded readers.[555] Or at least the jury could so conclude, he thought, and that was the main point of his opinion, which sharply limited appellate review of jury verdicts in subversive speech cases.[556] As long as there was "some evidence, competent and substantial," the Court would not second-guess the jury's judgment that the defendants' publications had a dangerous tendency to encourage resistance to the war and to curtail war-related manufacturing.[557] And "some evidence" was nothing more than the strident

550. *Id.* at 618–19.
551. *Id.* at 619.
552. *Id.* at 627.
553. *Abrams*, 250 U.S. at 617–18. *See also* RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 4–5, 22–23 (1987).
554. *Id.* at 622.
555. *Id.*
556. *Id.* at 619–24.
557. *Id.* at 619.

statements in the circulars.[558] Considering *Abrams* together with *Schenck*, First Amendment scholar Harry Kalven concluded that the Court's outlook was unmistakable: "While the nation is at war serious, abrasive criticism of the war or of conscription is beyond constitutional protection."[559]

From the perspective of history, the most startling aspect of *Abrams* was not the majority opinion, but the dissent by Holmes, which Brandeis joined.[560] What Holmes had to say, and Brandeis followed up on in later dissents, was at the time about as effective as shouting into the full force of a category five hurricane. In the fullness of time, however, Holmes and Brandeis would prevail, though neither lived to see the fruits of their efforts. Explaining why Holmes seemed to change his entire perspective on the First Amendment in a matter of months has been a minor industry in academia. Or did he change his mind? Holmes always insisted that his votes in the three cases were consistent. Where *Abrams* went amiss, Holmes thought, was in misapplying the "clear and present danger" test that he had articulated in *Schenck*, and which he now elaborated again: "It is only the present danger of immediate evil *or* an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."[561] Notice the disjunctive *or* in the statement. Speech could be sanctioned if there was "an intent to bring [an '*immediate* evil'] about," regardless of its actual impact.[562] Urging others to violate the law was proscribed, Holmes apparently still thought, but the question remaining was the immediacy of the danger posed by the expression in question.[563]

Holmes had never before stressed the immediacy of the danger provoked by speech—in neither *Schenck* nor *Debs* had the government offered any evidence of immediate danger. In *Abrams*, he lampooned the "poor and puny anonymities"[564] who styled themselves revolutionaries: "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man,

558. *Id.* at 624.
559. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 147 (Jamie Kalven ed., 1989).
560. *Abrams*, 250 U.S. at 625 (Holmes, J., dissenting).
561. *Id.* at 628 (emphasis added).
562. *Id.*
563. *Id.*
564. *Id.* at 629.

without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[565]

As to intent, Holmes insisted that there must be a showing of "actual intent."[566] "I am aware," he acknowledged, "that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue."[567] The proper use of intent for First Amendment purposes, he thought, was that "a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."[568] Assuming that intent were established, "the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow."[569] At worst, "The Rebels" were "poor and puny anonymities," who posed no threat to anyone.[570] Holmes' analysis of intent showed that he was still wedded to the notion that the publications should be judged by the standard of criminal attempts. "Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt."[571] Despite Holmes' continued reliance on his views about attempted crime, the position he took in *Abrams* represented a critical change from what he had written in *Schenck*, when he wrote, "Of course the document would not have been sent unless it had been intended to have some effect."[572] Starting with *Abrams*, Holmes would no longer rely solely on the text of the speech to reveal the speaker's intent. Rather, he required some independent evidence to reveal the actual state of mind of Jacob Abrams and his comrades.[573]

All of this was a lead into the portion of Holmes' dissent that is most often quoted and scrutinized. In one long paragraph, Holmes laid out his philosophy of free expression, which was premised on the need for a free "marketplace of ideas":

565. *Id.* at 628.
566. *Id.*
567. *Id.* at 626.
568. *Id.* at 627.
569. *Id.* at 629.
570. *Id.*
571. *Id.* at 628.
572. Schenck v. United States, 249 U.S. 47, 51 (1919).
573. *Abrams*, 250 U.S. at 628.

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so *imminently threaten immediate interference* with the lawful and pressing purposes of the law that an immediate check is required to save the country.[574]

If Holmes meant his description of "the theory of our Constitution" to be a summary of the actual intent of the framers of the First Amendment, it can at best be termed romantic in view of the limited protection afforded to expression in the eighteenth century. No, this was Holmes' reconsidered view of speech freedoms, and his metaphor about experimentation reflected Holmes' disdain for moral absolutes and his parallel partiality to pragmatism.[575]

Holmes proposed a simple test to ascertain if speech had gone beyond the pale of constitutional protection. "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"[576] Speech may be suppressed, in other words, if there is no opportunity for opposing speech to counter its malevolent tendencies. On that count, the Sedition Act of 1798 did not pass muster: "I wholly disagree with the argument of the Government

574. *Id.* at 630 (emphasis added).
575. *See supra* text accompanying notes 442–60.
576. *Abrams*, 250 U.S. at 630–31.

that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 . . . by repaying fines that it imposed."[577] As already noted, Justice Brennan would say virtually the same thing years later in *New York Times v. Sullivan*, and the same rejoinder in order: History is not a court.[578] Nothing after the original acts can change what happened or the meaning of the events to those alive when they transpired.[579]

Whatever Holmes said to the contrary, his attitudes about free expression certainly did change rather abruptly between his opinions of March 1919 in *Schenck*, *Frohwerk* and *Debs*, and his dissent the subsequent November in *Abrams*. Multiple influences have been proposed to explain the transformation. Holmes had private conversations and correspondence with Judge Learned Hand in New York, who had written a controversial opinion as a district judge proposing an alternative to the natural and probable tendency standard.[580] In 1917, Hand ruled in *Masses Publishing Co. v. Patten* that words could be penalized under the Espionage Act only if they amount to a "direct incitement to violent resistance. . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."[581] Hand was interpreting a statute, yet in the process he had floated an alternative to the natural tendency approach. Hand's approach focused on whether certain words were uttered, rather than their effect under the circumstances. Judicially, Hand's idea went nowhere at the time, as he was overruled by the Second Circuit and ordered to use the natural and probable tendency test.[582] In later years he abandoned the idea himself. But what he wrote in *Masses Publishing* ripped the prevailing First Amendment doctrine to its foundations:

> [T]o arouse discontent and disaffection among the people with the prosecution of the war and with the draft

577. *Id.* at 630.

578. New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

579. *Id.*

580. S*ee generally* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) (discussing the Holmes-Hand relationship).

581. Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

582. *Masses*, 246 F. at 37.

> tends to promote a mutinous and insubordinate temper among the troops. This, too, is true; men who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by a tyrannous disregard for the will of those who must suffer and die, will be more prone to insubordination than those who have faith in the cause and acquiesce in the means. Yet to interpret the word 'cause' so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument.[583]

Judge Hand wished, as he wrote privately, for "a qualitative formula, hard, conventional, difficult to evade."[584] As for Holmes' alternative, Hand found it wanting: "I am not wholly in love with Holmesy's test . . . . Once you admit that the matter is one of degree . . . you give to Tomdickandharry, D.J., so much latitude that the jig is at once up."[585] Capping that, he reminded Holmes that the members of the Court were themselves not immune to bias: "Besides . . . the Nine Elder Statesmen, have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged."[586] Hand appreciated that the judiciary itself could not be trusted in times of national crisis to uphold First Amendment rights, and tight doctrinal nets needed to be woven to forestall abuses.[587] His concerns have preoccupied much of modern First Amendment law, as the Court has endeavored to erect fences of rules that cannot be evaded easily by any kind of official action.

Holmes' may have been influenced by the withering academic fire directed at his pre-*Abrams*' opinions from several noted academics. Most intriguing is the relationship between Holmes and a young Harvard Law School professor, Zechariah Chafee, who had been introduced to Holmes by Hand (the Tomdickandharry letter was from Hand to Chafee). Chafee had opened his attack on

583. *Masses*, 244 F. at 539–40.

584. Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921) *quoted in* Gunther, *supra* note 580, *at* 770.

585. *Id.*

586. *Id.*

587. *Id.*

the Court's speech cases with a short essay in the New Republic magazine in 1918, followed by a path-breaking article in the Harvard Law Review in 1919, *Freedom of Speech in War Time*; he expanded this article into a highly influential book, *Freedom of Speech* published in 1920.[588] The premise of Chafee's argument was that freedom of speech served "[o]ne of the most important purposes of society and government," namely "the spread of truth on subjects of general concern. This is possible only through unlimited discussion."[589]

Chafee's ideas fit well with Holmes's personal philosophy, which combined skepticism about ultimate knowledge and faith in the scientific method of testing theories publicly as the best approximation of truth. His dissent in *Abrams* hinged on the pursuit of truth as the desideratum of speech—the best test of truth, he had said, was the test of the marketplace. That part came not so much from Chafee, as it did John Stuart Mill, the English utilitarian whom Holmes had met as a young man, and whose philosophy of free expression could be detected in the *Abrams*' dissent. Mill had argued in *On Liberty*, that

> [T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind . . . . All silencing of discussion is an assumption of infallibility.[590]

Human error was self-correcting if there was unlimited discussion, Mill had written, because a person "is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument."[591]

Holmes had known about Mill's theories for decades, yet he previously had ignored the Englishman's philosophy in his legal writing, presumably because Mills was not stating the law as it existed, only as it should be.[592] Chafee convinced Holmes—again,

588. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 69 (1920).
589. *Id.*
590. JOHN STUART MILL, ON LIBERTY 77 (Gertrude Himmelfarb ed., 1974) (1859). See HOWE, *supra* note 483, at 226–29 for a discussion of Holmes' meeting with Mill.
591. *Id.* at 80.
592. *See* Bogen, *supra* note 481, at 113–15.

quite inaccurately—that Blackstone did not correctly state the law of free speech as it had developed in America. In a letter to Chafee in 1922, which responded to the professor's inquiry as to the origin of the term "clear and present danger," Holmes replied hastily:

> The expression that you refer to was not helped by any book that I know—I think it came without doubt after the later cases (and probably you—I do not remember exactly) had taught me that in the earlier Paterson [sic] case, if that was the name of it, I had taken Blackstone . . . as well founded, wrongly. I surely was ignorant. But I did think hard on the matter of attempts in my Common Law and a Mass case, later in the Swift case (U.S.) And I thought it out unhelped . . . . And much later I found an English . . . case in which one of the good judges had expressed this notion in a few words.[593]

Ultimately only so much can be done to probe a judge's reasons for adopting a new course of thinking about a subject, especially when the subjects insist that they hadn't changed their minds. Perhaps they weren't even aware that they were doing so. These were tense years, and Holmes and the other Justices felt multiple pressures. The war had ended, but bombs were exploding at home. Agriculture was in the dumps. Mass strikes hit everywhere. The war had been backed by progressive intellectuals and politicians, who loathed ceding to judges the task of articulating social interests, since that was precisely what they saw as the flaw in the *Lochner* line of cases. Progressives, however, began to voice doubts about the European venture as the American death tolls grew to staggering numbers. The repression of dissent and the rise of intolerance were unmistakable and would get worse.

That Holmes' words fell mostly on deaf ears became apparent in March 1920, when the Court sustained Espionage Act convictions in two more cases.[594] Both involved allegations that they published "false reports" harmful to military success and recruiting.[595] In *Schaefer v. United States*, the defendants received sentences of up to five years for publishing two German-language newspapers that caustically attacked American intervention in the

593. Letter from Oliver Wendell Holmes, Jr. to Zechariah Chafee, Jr. (June 12, 1922) (Chafee Papers, Harvard Law School Library, Box 14, Folder 12), *quoted in* Bogen, *supra* note 481, at 100.

594. Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920).

595. *Pierce*, 252 U.S. at 242; *Schaefer*, 251 U.S. at 468.

war.[596] By their account, recruiting was a failure because American men did not wish to fight "to satisfy British lust for the mastery of the world."[597] Justice McKenna took this remark and others of a similar nature to be "willfully false," in that they depicted the war as contrary to the wishes of the people and "the result of the machinations of executive power."[598] One article, a reprint from another source, was picked out by McKenna as an exemplar of a number of purportedly falsified accounts.[599] It reported a speech by Senator Robert La Follette, who had urged that the war be financed by taxes on the rich who profited from the war, lest the people find themselves in "bread lines."[600] Defendants' newspaper changed the last words to "bread riots."[601] That altered the meaning profoundly, McKenna contended, from a mild statement about wartime sacrifices to a prophesy of "turbulent resistance."[602] Referring to Americans as "Yankees," another article lambasted their "spiritual quality"—Yankees had "a capacity for lying, which is able to conceal to a remarkable degree a lack of thought behind a superfluity of words."[603] This was said to deflate assurances by the Wilson administration that the United States would send an enormous force to defeat the Germans—the newspaper referred to this move as a "Yankee Bluff" that was belied by the failure of recruiting and conscription.[604] In sustaining most of the convictions, the Court approved a jury instruction that invited the panel "to call upon the fund of general information which is in your keeping."[605] No evidence was introduced by the government tending to show the falsity of the articles.[606] But a jury could find, based on their common knowledge, that "[t]he tendency of the articles and their efficacy were enough" to establish both criminal intent and an illegal attempt to frustrate the war effort.[607]

596. *Schaefer,* 251 U.S. at 468, 482.
597. *Id.* at 480.
598. *Id.* at 481.
599. *Id.*
600. *Id.*
601. *Id.*
602. *Id.*
603. *Id.* at 478.
604. *Id.*
605. *Id.* at 473.
606. *Id.* at 472.
607. *Id.* at 479.

Schaefer prompted the first of several dissenting opinions by Justice Brandeis on the subject of free expression.[608] Brandeis, as Holmes had done earlier, rebuked the majority for not following the clear and present danger test.[609] No proof was offered, nor even suggested, he argued, tending to show that the articles could have interfered with the military or caused a dereliction of duty.[610] Instead, the prosecution was an effort at thought control: "The jury . . . must have supposed it to be within their province to condemn men, not merely for disloyal acts, but for a disloyal heart: provided only that the disloyal heart was evidenced by some utterance."[611] Inevitably, the convictions would serve as warnings to others, and "doubtless discourage criticism of the policies of the government."[612]

A week later, the Court decided the last of its cases that term involving prosecutions under the Espionage Act. *Pierce v. United States*[613] proved beyond doubt that a majority of the Court would uphold convictions for doing nothing other than aggressively questioning of the basis for the war.[614] It also would be the last straw for Justice Brandeis, who could not accept the imprisonment of people for expressing a partisan opinion about a matter of the gravest national importance.[615]

The defendants were members of the Albany, New York branch of the Socialist Party.[616] They obtained a four-page pamphlet from the national party, titled "The Price We Pay," written by Irwin St. John Tucker, a controversial Episcopalian priest who integrated socialism into a religion based on the tenets of the Anglican Church.[617] Tucker himself had been convicted under the Espionage Act in a separate case and sentenced to twenty years.[618] Much of his paper questioned America's motives for entering the war and depicted a dire future for the soldiers who were sent to the

608. *Id.* at 482 (Brandeis, J., dissenting).
609. *Id.*
610. *Id.* at 493.
611. *Id.*
612. *Id.* at 494.
613. 252 U.S. 239 (1920).
614. *Id.*
615. *Id.* at 253 (Brandeis, J., dissenting).
616. *Id.* at 247 (majority opinion).
617. *Id.*
618. Berger v. United States, 255 U.S. 22, 27 (1921); Berger v. United States, 275 F. 1021, 1021 (7th Cir. 1921).

war.[619] Tucker featured gruesome visual imagery in his writing:

> Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.
>
> Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage
>
> to you.
>
> Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.[620]

Unlike other provocateurs who urged or implied defiance of the military, Tucker practically sneered as he informed men that they were powerless to resist: "You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; Your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay; It is the price you pay for your stupidity—you who have rejected Socialism."[621]

This possibly may have been one of the most ill-conceived political recruitment strategies ever devised, but that was its ostensive purpose. Enclosed in many of the flyers were additional sheets with information on joining in the Socialist Party.[622]

The Albany Socialists waited to distribute copies of Tucker's diatribe until the outcome of a federal trial in Baltimore, which also was considering the lawfulness of the same writing.[623] After that trial resulted in a directed acquittal, the Albany contingent proceeded with their distribution, placing hundreds of copies on doorsteps in Albany.[624] Prudent as they may have been in waiting for the Baltimore ruling, the defendants nonetheless were convicted under the Act for making false reports based on alleged falsehoods in Tucker's work and for attempting or conspiring to disrupt military operations.[625]

Tucker's screed contained a series of assertions that, if taken as

619. *See Pierce*, 252 U.S. at 245–46.
620. *Id.*
621. *Id.* at 246.
622. *Id.* at 248.
623. *Id.*
624. *Id.*
625. *Id.* at 240.

literal statements of fact, could be questioned for veracity.[626] For example: "Our entry into [the war] was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked."[627] Justice Mahlon Pitney's majority viewed this exuberant prose literally, intended "to produce a belief that our participation in the war was the product of sordid and sinister motives, rather than a design to protect the interests and maintain the honor of the United States."[628] Rather the opposite was true of the American entry into the war, Pitney asserted, and moreover the defendants must have known it:

> Common knowledge (not to mention the President's address to Congress of April 2, 1917, and the Joint Resolution of April 6 declaring war . . . which were introduced in evidence) would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false, and such common knowledge went to prove also that defendants knew they were untrue.[629]

Whether or not one was convicted depended on the "common knowledge" of a jury as understood by judges, which was a system that easily could produce inconsistent adjudications concerning the same publication. Juries also were assigned the task of determining if "the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States," based on "all the circumstances of the time and considering the place and manner of distribution."[630] Critics of the war had to choose their words carefully. Hyperbole and metaphor could send one to prison.[631]

Brandeis again dissented with a methodical dissection of the majority's opinion.[632] (Holmes joined him, but wrote nothing.)[633] To begin with, Brandeis wrote, Tucker's contentions were "in essence matters of opinion and judgment, not matters of fact to be

626. *See id.* at 245–47.
627. *Id.* at 247.
628. *Id.* at 249–50.
629. *Id.* at 251.
630. *Id.* at 250.
631. *See id.*
632. *Id.* at 253 (Brandeis, J., dissenting).
633. *Id.*

determined by a jury."[634] To tackle the assertion that the war was being fought to assure repayment of loans made by J. P. Morgan, Brandeis quoted similar statements in the congressional record by Senators and Representatives.[635] President Wilson, "himself a historian," Brandeis noted, "said before he was President and repeated in the New Freedom that: 'The masters of the government of the United States are the combined capitalists and manufacturers of the United States.'"[636] In any event, Brandeis thought there was no evidence that the defendants themselves were aware of any falsities in Tucker's presentation: "They were mere distributors of the leaflet. It had been prepared by a man of some prominence."[637] Nor did they act rashly, intending to break the law—they waited until a federal judge had cleared the pamphlet.[638] Finally, it could hardly be claimed that they created a clear and present danger to the prosecution of the war, inasmuch as "the leaflet, far from counseling disobedience to law, points to the hopelessness of protest . . . and indicates that acquiescence is a necessity."[639]

Pierce and *Schaeffer* were turning points for Louis Brandeis. In 1921, he told Professor Felix Frankfurter in a recorded conversation that "I have never been quite happy about my concurrence in [the] *Debs* and *Schenck* cases. I had not then thought the issues of freedom of speech out—I thought at the subject, not through it. Not until I came to write the *Pierce* and *Schaeffer* dissents did I understand it."[640] Brandeis also believed that it would have been better to reserve the "clear and present danger" standard for peacetime.[641] It would have been wiser to justify the Espionage Act convictions as justified "frankly on the war power . . . and then the scope of espionage legislation would be confined to war. But in peace the protection against restriction on freedom of speech would be unabated."[642] In wartime, "all bets are off."[643]

634. *Id.* at 269.
635. *Id.* at n.4.
636. *Id.* at 270–71 (quoting WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 57 (1921)).
637. *Id.* at 270.
638. *Id.* at 271.
639. *Id.* at 272.
640. Conversation between Felix Frankfurter and Louis Brandeis (Aug. 8, 1921) (transcript available at Harvard Law School Library, Louis D. Brandeis Papers, Box 114, Folder 14), *quoted in* RABBAN, *supra* note 210, at 362–63.
641. *Id.*
642. *Id.*

State governments also had been active in suppressing political speech since the end of the century, when anti-anarchism laws were enacted following the Haymarket bombing.[644] President McKinley's assassination had led to enactment of criminal syndicalism statutes that were specifically aimed at stopping efforts to overthrow government by force or violence.[645] Following McKinley's murder, there were hundreds of state prosecutions under syndicalism laws to counter anarchist speech. States passed new statutes to deal with anarchists and Bolsheviks. When America entered the World War I, many states supplemented the Espionage Act with their own versions.[646] By 1920 thirty-two states had passed statutes outlawing seditious utterances or display of the red flag, which was considered a symbol of anarchism or Bolshevism.[647] Minnesota made it a crime to publicly "advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States or the state of Minnesota."[648] A separate section made it unlawful to teach or advocate "that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."[649]

One case reached the Court to review a conviction under Minnesota's act: *Gilbert v. Minnesota*,[650] decided in the closing days of 1920. Joseph Gilbert was an official of the Nonpartisan League, a populist farmers' organization centered in the upper Midwest and Northwestern states.[651] At a public meeting of the league in 1917, Gilbert delivered a speech in which he derided President Wilson's claim that the war would "make the world safe for democracy."[652] America itself was not exactly democratic, Gilbert responded:

> Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a

643. *Id.*
644. Wiecek, *supra* note 496, at 382; *see also* RABBAN, *supra* note 210, at 25.
645. *Id.* at 382–83.
646. *See, e.g.*, 1917 Minn. Laws §§ 8521-2 to 8521-5. *See also* David M. Rabban, *The Emergence of Modern First Amendment Doctrine,* 50 U. CHI. L. REV. 1205, 1304 (1983).
647. *See* MURRAY, *supra* note 497, at 233–34.
648. Gilbert v. Minnesota, 254 U.S. 325, 326–27 (1920) (quoting 1917 Minn. Laws §§ 8521-2 to 8521-5).
649. *Id. See also* SCHEIBER, *supra* note 411, at 54.
650. 254 U.S. 325 (1920).
651. *Id.* at 334 (Brandeis, J., dissenting).
652. *Id.* at 327 (majority opinion).

> good democracy, for Heaven's sake why should we not vote on conscription of men? We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours.[653]

The speech was not especially well received by its immediate audience, as Justice McKenna reported in his majority opinion: "There were protesting interruptions, also accusations and threats against him, disorder, and intimations of violence."[654] Nevertheless, Gilbert was convicted under the statute and served a year in jail.[655]

In upholding Gilbert's conviction, Justice McKenna's opinion perceived the statute as "a simple exertion of the police power to preserve the peace of the state."[656] The audience's hostile reaction to the speech justified the law as an exercise of the state's police power to prevent violence. Assuming for sake of argument, that the First Amendment applied to a state law, Gilbert's declamation went beyond the bounds of a citizen's right to discuss public policy: "Gilbert's speech had the purpose they denounce. The nation was at war with Germany, armies were recruiting, and the speech was the discouragement of that—its purpose was necessarily the discouragement of that."[657] McKenna added that "every word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted."[658] It was seditious libel, plain and simple. That was restrictive enough of public opposition to the war, but McKenna's suggestion that speech could be quashed because it provoked an adverse audience reaction had even more far-reaching implications. Anyone presenting a controversial thesis might be silenced—arrested—on account of a crowd's unruly actions.

Justice Brandeis contributed the only dissent on the First Amendment aspects of the case.[659] (Holmes, inexplicably, concurred in the judgment upholding Gilbert's conviction).[660]

653. *Id.*
654. *Id.* at 331.
655. *Id.* at 333.
656. *Id.* at 331.
657. *Id.* at 333.
658. *Id.*
659. *Id.* at 334 (Brandeis, J., dissenting).
660. *Id.* (Holmes, J., concurring).

Minnesota's law was striking in its breadth, Brandeis emphasized.[661] A conviction was possible even if the advocacy was "wholly futile and no obstruction resulted."[662] It did not matter what the speaker's intent happened to be. Even if the speaker was giving career advice to young men—advising them to pursue the civil service, farming, or a profession as ways to serve their country—a violation would occur. (If enforced today, someone counseling against enlisting in the National Guard because of the possibility of extended overseas combat deployment could be found guilty.) And, unlike the Espionage Act, the state law remained in force when "the United States was at peace with all the world."[663] "It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances."[664] It applied even in the privacy of a home. Religiously motivated pacifists would run afoul of the law by advising their children not to enlist. For Brandeis, this was a law that "aims to prevent, not acts, but beliefs."[665]

Regarding Minnesota's purported need to maintain public order, Brandeis countered that for democracy to function the citizen must have the right to speak or write about governmental affairs, "to teach the truth as he sees it."[666] Political conflict was inevitable and actually could be healthy for a nation: "Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril."[667] Brandeis implicitly balanced the possibility of turmoil against the advantages of candid commentary about the course of public affairs, with the scale tipping toward the latter in the absence of a clear and present danger.[668] Borrowing from Holmes' dissent in *Abrams*, he said that the question to ask was

661. *See id.* at 334–43.
662. *Id.* at 341.
663. *Id.*
664. *Id.* at 334.
665. *Id.* at 335.
666. *Id.* at 338.
667. *Id.*
668. *See id.*

whether there was time for error to be conquered by truth.[669] If there was, repression of the speech was not allowed.[670]

For the remainder of the 1920s, state cases provided the grist for the Court's First Amendment rulings, all of which involved radicals of one type or another. Most of these were reviews of convictions under the criminal syndicalism statutes described previously. During 1919 and 1920 alone, the height of the Red Scare, some 1400 individuals were arrested under state syndicalism and sedition laws, with hundreds convicted.[671] New York's statute, which was enacted in 1902, became the subject of one of the Court's most important First Amendment rulings, *Gitlow v. New York*.[672] The legislation defined "criminal anarchy" as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means."[673] It was a felony in New York to "advocate[]" anarchism or to "advocate[], advise[], or teach[] the duty, necessity or propriety" of toppling the government by force or by assassination of officials.[674] Publishing or distributing anarchist literature was likewise a felony.[675] Note the contrast between the legislative means used here and in the Espionage Act. The latter made it illegal to accomplish certain substantive acts, such as disrupting recruiting; speech could be punished if it attempted to incite others to engage in the criminal act. New York's statute, like Minnesota's in *Gilbert*, prescribed specific assertions. In Minnesota, one could not "teach or advocate" that a man should not join the army or navy.[676] New York law, by directly prohibiting certain words, did not allow a person to advocate the theory that a government should be overthrown by violence.[677] Selling a copy of John Locke's *Second Treatise of Government*, in theory, could earn one a trip to Sing Sing. Locke not only defended the peoples' ultimate right of rebellion, a view endorsed by American revolutionaries in 1776, but he

669. *Id.*
670. *Id.*
671. ROBERT J. GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO THE PRESENT 147 (1978).
672. N.Y. PENAL LAW § 160–61 (1909), *quoted in* Gitlow v. New York, 268 U.S. 652, 654–55 (1925).
673. *Id.* § 160.
674. *Id.* § 161.
675. *Id.*
676. *See* Gilbert v. Minnesota, 254 U.S. 325, 326 (1920).
677. *See* N.Y. PENAL LAW § 160 (1909).

specifically stated that the book was dedicated to defending the Glorious Revolution.[678]

Although aimed at anarchists, who usually espoused the elimination of government as people knew it, the New York law eventually snared quite another animal, the revolutionary socialist.[679] In June 1919, the "mainstream" Socialist Party underwent a schism that created the Left Wing Section of the party, a group that embraced militant, revolutionary action to achieve a socialist society.[680] In short order, the Left Wing would bifurcate into the Communist Party of America and the Communist Labor Party, with a combined membership of around 70,000; they merged in 1923 as the Communist Party of the United States.[681] Benjamin Gitlow was a board member and business manager of the Left Wing's newspaper, *The Revolutionary Age*.[682] Tucked into each of the 16,000 copies of the first edition of the paper was the "Manifesto" of the Left Wing.[683] On account of his role in these publishing activities, Gitlow was convicted under the New York act.[684]

As Justice Edward T. Sanford related in his majority opinion, the Manifesto

> advocated, in plain and unequivocal language, the necessity of accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialism,' based on 'the class struggle' and mobilizing the 'power of the proletariat in action,' through mass industrial revolts developing into mass political strikes and 'revolutionary mass action,' for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a 'revolutionary dictatorship of the proletariat,' the system of Communist Socialism.[685]

Despite the stridency, Sanford conceded that "[t]here was no evidence of any effect resulting from the publication and

678. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 386 (Thomas P. Peardon ed., 1952) (1690).

679. *See* Gitlow v. New York, 268 U.S. 652, 655–56 (1925).

680. *Id.* at 655–56.

681. MURRAY, *supra* note 497, at 51–53, 277.

682. *Gitlow*, 268 U.S. at 655. Gitlow was the co-founder of the Communist Labor Party and the vice-presidential candidate of the Communist Party in 1924 and 1928. MURRAY, *supra* note 497, at 51, 277.

683. *Gitlow*, 268 U.S. at 655–56.

684. *Id.* at 654.

685. *Id.* at 657–58.

circulation of the Manifesto."[686] And the absence of effect was Gitlow's principal defense.[687] It was to no avail. Regardless of the publication's effectiveness, the Court held that "a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means."[688] Inherently, words of this nature "involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution."[689] That "the effect of a given utterance cannot be accurately foreseen" was irrelevant: "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration."[690] Indubitably, the state need not wait until the flames engulf it; rather, it may "suppress the threatened danger in its incipiency."[691]

But what about "clear and present danger"? At least in the Espionage Act cases the Court had judged the defendants' expressions in relation to something specific, such as interfering with recruiting. That approach was inapposite to the situation in *Gitlow*, Justice Sanford responded, "where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[692] Cases like *Schenck, Frohwerk* and *Abrams* involved a prohibited substantive result (frustrating the war effort), and "the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent."[693] New York's legislature, by contrast, had "previously determined the danger of substantive evil arising from utterances of a specified character."[694] The state had *banned specific words*, and a conviction could be obtained regardless of their actual consequences on a given occasion (note the similarity to Hand's

686. *Id.* at 656.
687. *Id.* at 664. Surely it is a sorry revolutionary who resorts to arguing that his propaganda is ineffectual. Gitlow, as it happens, later became a crusading anti-communist.
688. *Id.* at 668.
689. *Id.* at 669.
690. *Id.*
691. *Id.*
692. *Id.* at 671.
693. *Id.*
694. *Id.*

approach).[695]

Gitlow did not directly hold that the First Amendment was applicable to the states. "For present purposes," Justice Sanford assumed that "the First Amendment . . . [was] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[696] Sanford did not explain the reason for this assumption, aside from citing several substantive due process cases upholding liberty of contract.[697] He gave no explanation for these references, although he seems to have meant that inasmuch as liberty of contract was grounded in the Due Process Clause under *Lochner v. New York*, and thereby restrained state power, then surely speech and press rights must be implied from the same constitutional text.[698] After *Gitlow*, the Court invariably held that the First Amendment applied to the states, without extensive justification. "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action," Chief Justice Charles Evans Hughes wrote in the 1931 case, *Near v. Minnesota*.[699] Citing nothing other than the previous cases in which the application of the First Amendment had merely been asserted, Hughes opined that the Court had "found [it] impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property."[700] If liberty of contract could be inferred from the Due Process Clause, it was embarrassing not to acknowledge free speech as a fundamental liberty. As Brandeis had written in his *Gilbert* dissent, "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."[701]

In footnote four of *United States v. Carolene Products*[702] in 1938, Justice Stone suggested another basis for applying the First Amendment to the states: it protects against "legislation which

695. *See id.* at 654.
696. *Id.* at 666.
697. *Id.* at 666 n.9.
698. At least these rights are specifically mentioned in the Constitution, whereas the same could not be said of liberty of contract.
699. *Near v. Minnesota*, 283 U.S. 697, 707 (1931).
700. *Id.*
701. Gilbert v. Minnesota, 254 U.S. 325, 343 (Brandeis, J., dissenting).
702. 304 U.S. 144 (1938).

restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation. . . ."[703] Stone gave this hint in the course of explaining why a trade restriction would be subject only to rational basis review.[704] If in the post-*Lochner* era the reasonableness of laws was left to the judgment of elected officials or their designees, then free speech was essential to inform their decisions.

Practically speaking, the application of the First Amendment to the states made no immediate difference, for as Justice Sanford wrote in *Gitlow*:

> [T]he freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.[705]

To be specific, "a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."[706] Again, the illusive notion of the "police power" was the determinative justification for the result. Sanford did not mention the possible value that Gitlow's speech might have had, or the value of other kinds of content that could be banned by a legislature under the Court's doctrine. As Sanford candidly stated, "the State is primarily the judge of regulations required in the interest of public safety and welfare."[707] Deference to the state was not total, but it was heavy. Here the state was acting from the most primal of groundings: "In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied."[708]

This time it was Holmes who dissented, with Brandeis tagging along.[709] Holmes disregarded the majority's deference to the legislature entirely and wrote as if the clear and present danger

703. *Id.* at 152 n.4.
704. *Id.* at 152.
705. Gitlow v. New York, 268 U.S. 652, 666 (1925).
706. *Id.* at 667.
707. *Id.* at 668 (quoting Great N. Ry. v. Clara City, 246 U. S. 434, 439 (1918)).
708. *Id.*
709. *Id.* at 672–73 (Holmes, J., dissenting, joined by Brandeis, J.).

standard were the applicable law.[710] Moreover, he embellished the standard considerably. In Gitlow's case, "there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."[711] It was all talk, to which a much higher standard should attach than for actions: "If the publication of this document had been laid as an attempt to induce an uprising against government *at once* and not at some indefinite time in the future it would have presented a different question."[712] What about Sanford's argument that Gitlow's publications were incitements to illegal actions? To this, Holmes responded with one of the most eloquent monologues of his career:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement . . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[713]

Holmes here articulated a much more nuanced theory of the First Amendment than he revealed in prior opinions. He also discarded any doubts that the Amendment applied to the states, although he allowed that the states might be given "a somewhat larger latitude of interpretation than is allowed to Congress," considering "the sweeping language that governs or ought to govern the laws of the United States."[714] By "present danger," Holmes emphatically meant *now*. Words could not be punished, whatever their tendency, unless they were likely to cause an immediate evil otherwise punishable by the government. It mattered decisively whether the defendants posed serious threats or were merely "puny anonymities," as he had labeled the five in

710. *See id.*
711. *Id.* at 673.
712. *Id.* (emphasis added).
713. *Id.*
714. *Id.* at 672.

Abrams.[715] Much more provocatively, Holmes embraced the full logic of the marketplace of ideas—if the advocates of proletarian dictatorship persuade the majority, so be it. After all, life was an experiment.

Two last pieces of the Red Scare era remain to be laid in place, one expanding its reach and the other signifying the beginning of a retreat from the "natural and probable tendency" era. They were decided on the same day. *Whitney v. California*[716] was an appeal from the conviction of Anita Whitney for criminal syndicalism.[717]

At the time of her arrest, Whitney had recently been a delegate from Oakland to the Socialist Party Convention in 1919, a meeting at which the left wing split from "the old-wing Socialists" to form the Communist Labor Party.[718] She and other less moderate Leftists were thrown out of the convention, whereupon they promptly reassembled and created the Communist Labor Party of California (CLP), which had a membership of about 3000 in 1919. Whitney was an alternate member of the state executive committee of the Party.[719] Essentially, Whitney was convicted of active membership in the CLP, whose syndicalist tendencies were evidenced by the party's official platform, which espoused the creation of a "revolutionary working class movement in America"[720] that would overthrow capitalism and replace it with the "Dictatorship of the Proletariat."[721] Mass strikes were singled out as valuable political weapons to mobilize the working class.[722] A model member of the party was one "who can not only teach, but actually help to put in practice the principles of revolutionary industrial unionism and Communism."[723]

Whitney herself claimed to be ambivalent about the militant course of the party, as she unsuccessfully urged an amendment that encouraged the CLP's participation as a political party in elections,

715. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting, joined by Brandeis, J.).

716. 274 U.S. 357 (1927).

717. *Id.* at 359.

718. *Id.* at 363. *See also* Ralph E. Shaffer, *Formation of the California Communist Labor Party*, 36 PAC. HIST. REV. 59, 70–71 (1967).

719. *Whitney*, 274 U.S. at 363–65. *See also* Shaffer, *supra* note 718, at 63, 67 (giving membership numbers), and 76 (indicating Whitney's alternate membership on the state executive committee of the Party).

720. *Whitney*, 274 U.S. at 363.

721. *Id.* at 364.

722. *Id.*

723. *Id.*

and commended ordinary political activism for its "tremendous assistance to the workers in their struggle of emancipation."[724] A major part of her defense at trial was that she had tried to steer the party toward a moderate, lawful course.[725] Whatever her intentions, Justice Sanford replied, she remained at the convention that adopted the radical platform and thereafter continued her membership in the party, even serving as an alternate to its state executive committee.[726]

In a blink-and-you'll-miss-it passage, Justice Sanford acknowledged without explanation that "freedom of speech" was "secured by the Constitution," and thus imposed a federal constitutional constraint on California.[727] Whitney did not profit from this development—*Gitlow* had settled that advocacy of syndicalism could be proscribed. The CLP "partakes of the nature of a criminal conspiracy" and "such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals . . . ."[728] Or, at least, a legislature was entitled to so conclude, and its "determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute . . . ."[729] Effectively, the Court had allowed the complete suppression of the CLP.[730]

Brandeis, joined by Holmes, concurred in the result,[731] but his opinion rejected virtually every premise of the majority. Free speech may not be absolutely privileged, Brandeis wrote, but it can only be restricted to avoid a serious harm that was imminent—an emergency in which an evil will occur "before there is opportunity for full discussion."[732] Apprehension of danger was not enough. "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women."[733] Nor was Brandeis willing to genuflect to legislative bans on specific advocacy. A state declaration of an imminent danger is entitled to "a rebuttable presumption," but a defendant must be afforded an

724. *Id.* at 365.
725. *Id.* at 366–67.
726. *Id.* at 367–68.
727. *Id.* at 371.
728. *Id.* at 372.
729. *Id.* at 371.
730. *Id.* at 371–72.
731. *Id.* at 372 (Brandeis, J., concurring).
732. *Id.* at 377.
733. *Id.* at 376.

opportunity to question "whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the Legislature."[734] Brandeis still upheld her conviction, on the basis that Whitney had not brought up the absence of a clear and present danger as a defense, and that in any event there "was evidence on which the court or jury might have found that such danger existed."[735]

Those were the bare legal conclusions of Brandeis's opinion. What transformed it into one of the most compelling pieces of legal writing in American history was his stirring defense of the importance of free expression. Pointedly aligning himself with the Jeffersonian thesis that "error of opinion may be tolerated where reason is left free to combat it,"[736] Brandeis presented a glowing picture of what free expression supposedly meant to the framers of the First Amendment.

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and

734. *Id.* at 379.
735. *Id.*
736. *Id.* at 375 n.3.

> proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.
>
> . . . .
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.[737]

Well, yes and no. Early Americans were not cowards, nor did they balk at taking dramatic, unprecedented steps. That does not mean they would have favored a movement fundamentally away from a republican society, as the CLP proposed. To the contrary, the Constitution in Article IV obliges the federal government to assure that the states maintain republican governments, not proletarian dictatorships. The end of the state to most of the framing generation was protection of private property, and that implied stability and some form of a free market economy. They did not always practice the doctrine that "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine,"[738] or "that the fitting remedy for evil counsels is good ones."[739] Silence was at times "coerced by law," and a person was not always allowed to "speak as you think."[740] Some of Brandeis's rendition was a misty-eyed version of early republicanism—that people had a duty to discuss politics, to correct public error, to not be "inert." Much of Brandeis' dissent, as with Holmes's in other cases, reflected a newly-found vision of free expression, not the prevailing view of eighteenth-century Americans, and certainly not of the law. His contention that the founders wanted to "make men free to develop their faculties" has more affinity with John Dewey's pragmatism than the sentiments of 1776 or 1787.[741] Still, what a vision!

Brandeis's history lesson was not so much untrue as exaggerated and incomplete. Repression *did* produce resentment

737. *Id.* at 375–77.
738. *Id.* at 375.
739. *Id.*
740. *Id.* at 375–76.
741. *See* Rabban, *supra* note 198, at 370.

among the American colonials. They, of all people, had used printing to foment rebellion. Yet revolutionary governments extracted loyalty oaths from the people on pain of losing the right to vote, to hold office, or to remain in the state. Tens of thousands of Loyalists were forced from the country for their beliefs, not uncommonly having left confiscated property behind them.[742] "From 1775 into the 1780s . . . woe betide the printer who dared question the propriety of separation from England or the War for Independence. Those kinds of printed sentiments could bring mobs, press-smashings, buckets of tar, and denuding of poultry."[743] To be sure, there existed a vigorous political press in the 1790s, flaming with harsh judgments about government figures and policies. That does not mean there were not limits, and calling for the overthrow of the government would have supported charges of seditious libel at common law.

On the same day that *Whitney* was decided in 1927, a unanimous Court struck down a conviction under the Kansas Syndicalism Act in *Fiske v. Kansas*.[744] *Fiske* marked the first occasion in which the Court squarely upheld a free speech claim on constitutional grounds. Adding to its distinctiveness was the author of the opinion: Edward T. Sanford, the man who had written *Gitlow* and *Whitney*. Harold B. Fiske was arrested because of his organizing activities in Kansas for the Industrial Workers of the World ("IWW").[745] The state had enacted a typical syndicalism statute, forbidding advocacy of violence as a means of effecting political or industrial change.[746] Justice Sanford did not criticize the statute itself—it was the application to Fiske that violated the Due Process Clause.[747] The entirety of the state's case against him consisted of a brief preamble from an IWW document depicting the perpetual struggle between the workers and the employers.[748] It said that

742. *See generally* HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY (1959); MARY BETH NORTON, THE BRITISH-AMERICANS: THE LOYALIST EXILES IN ENGLAND, 1774-1789 (1972); Ruth M. Keesey, *Loyalism in Bergen County, New Jersey*, 18 WM. & MARY Q. (3rd Ser.) 558 (1961); Robert S. Lambert, *The Confiscation of Loyalist Property in Georgia, 1782-1786*, 20 WM. & MARY Q. (3rd Ser.) 80 (1963); Harry E. Seyler, *Pennsylvania's First Loyalty Oath*, 3 HIST. OF EDUC. J. 114 (1952).

743. Teeter, *supra* note 121, at 521.

744. 274 U.S. 380 (1927).

745. *Id.* at 382.

746. *Id.*

747. *Id.* at 387.

748. *Id.* at 383.

"hunger and want are found among millions of working people and the few who make up the employing class have all the good things of life."[749] Only an abolition of the wage system would cure these ills, the IWW urged in the booklet.[750] Fiske testified that, as he understood the IWW's plans, the union intended to obtain industrial control entirely through legal, peaceful means.[751] Nevertheless, the jury convicted him, possibly because the IWW's reputation for aggressively confronting authorities convinced the jurors that its plans in Kansas were not entirely pacific.[752]

Sanford could find "no evidence" whatsoever that Fiske advocated syndicalism as defined by the statute.[753] Bad reputations could not justify convictions. Not a word in the preamble suggested violence or other unlawful methods, which the statute required.[754] "Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment."[755] In one sense, *Fiske* was not so much about freedom of speech as due process: a court cannot convict a defendant when literally no evidence or reasonable inferences from proven facts support the verdict. Sanford distinguished the constitutional rulings in *Gitlow* and *Whitney* by the content of the messages—the defendants in those cases threatened unlawful behavior.[756]

Fiske was one of those cases, easy on the facts, that allow the Court to slip into another doctrinal direction without justifying the shift—or seemingly unaware of its ever-so-slightly altered course. Formally, nothing much had changed. There had been no repudiation of the natural and probable tendency test. Sanford's opinion only overturned the conviction of one man; it did not question to the constitutionality of the state's syndicalism act. Advocacy of violent actions remained unprotected. Most of the Justices had not abandoned the idea that a valid police power rationale would prevail over assertions of speech rights. Subtle changes were nevertheless apparent, or at least apparent when

749. *Id.* at 382–83.
750. *See id.* at 383.
751. *Id.*
752. *Id.* at 383–84.
753. *Id.* at 386.
754. *Id.* at 386–87.
755. *Id.* at 387.
756. *Id.*

reviewed years later. That the First Amendment applied to the states was by 1927 unquestionably accepted by the Court. And, importantly, *Fiske* showed a willingness to examine the evidence and reassess a jury's determination of guilt, something the Court consistently had been unwilling to do, so long as the jury was correctly instructed.[757] Rather than defer to the factual conclusions of the Kansas courts, Sanford announced:

> this Court will review the finding of facts by a State court *where a Federal right has been denied* as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.[758]

"Where a federal right has been denied" was a new direction for a free expression case, but it was not so different than the type of strict scrutiny the Court applied to liberty of contract cases. In many of those, the Court openly substituted the collective understanding of the Justices on matters of fact.

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Eventually Holmes and Brandeis prevailed in shaping the modern judicial interpretation of free expression. It took fortitude to protect radicals whom most would just as soon have locked up and forgotten. And they did it eloquently, in words that ordinary people could read and appreciate when reprinted in newspapers. For all their accomplishments, however, both had incomplete visions of free expression. Holmes championed the marketplace of ideas generated by free speech as the "best test of truth" that humans could expect. For testing scientific theories, valuing the worth of a corporation's stock, or deciding the best price for a product, among many other uses, the metaphor made sense. But it did not fit well in non-empirical pursuits, such as art and fiction, whose practitioners and consumers have another kind of truth in mind. Beauty and morality, for example, are two subjects that humans quarrel over, but only to a certain point are they susceptible to rational argument. Of course, one's consideration of the beautiful or the good may benefit from discussion, but all the talk for eternity cannot prove the ultimate about one or the other. Eventually, facts fail to provide the answer and some non-empirical

757. *See id.*
758. *Id.* at 385–86 (emphasis added).

method is needed. People can discuss a piece of art, and rate its beauty, but that would only show the weight of preferences, not whether the art *was* beautiful. In some settings, such as a trial on the guilt or innocence of an alleged criminal, or on the negligence of someone who caused harm, we do not want the marketplace of the public to affect the mini-market of the jury. Buildings are often better designed by one rather than the community. In wartime or serious emergencies, the marketplace may need to be shuttered temporarily to preserve national existence and lives—or at least Holmes argued in *Schenck*, and never repudiated it in an opinion.

Holmes did not consider that the market in ideas, like the financial market, is fraught with imperfections that hinder it from even approximating the truth at times. This already had produced a dilemma for some progressive thinkers. If, as it was well known, markets in stocks and commodities were in need of regulation, why wouldn't it follow that the market in expression needed governmental oversight? Progressivism encouraged the view that individual rights should be interpreted in light of the social needs of the community, as opposed to being privileges to speak or act in ways that served only a person's or a group's interests irrespective of injuries to others. However, after witnessing wartime repression and the subsequent harassment of left-wing activists, a fair number of progressives developed into civil libertarians, forming advocacy groups such as the American Civil Liberties Union.[759]

Brandeis agreed with Holmes' free speech positions in key respects. He embraced the concept of a marketplace of ideas by extolling the proposition that in "frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril."[760] Along with Holmes, he approved a practical criterion for determining whether an emergency existed that justified curtailing speech. The question to ask was whether there was time for the market to work—for error to be rebutted. This translated into a requirement that speech must be the cause of *immediate harm* before action could be taken to curtail or punish it. Fear alone was not sufficient for suppression, because apprehension easily becomes panic. Rebuttal of erroneous ideas by counter-speech was the preferred means of deflating the social harms caused by false

759. *See* Rabban, *supra* note 198, at 211–47.

760. Gilbert v. Minnesota, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting).

utterances or incitements to illegal actions. Some harms would justify state suppression, but not just any ones: there must be "the probability of *serious injury* to the State," as opposed to merely "some violence" or "destruction of property."[761]

At the same time, Brandeis limited his solicitude to expression that contributed "to the discovery and spread of political truth," which excluded an enormous range of expression.[762] He placed much confidence, too much possibly, in the capacity of the public to exercise "the power of reason as applied through public discussion."[763] Brandeis did not find much clarity in the Court's use of the "clear and present danger" test: "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present . . . ."[764]

All of these positions taken by Holmes and Brandeis were rooted in value judgments that, consciously nor not, set up free expression as a preferred right, one that could not be overcome by ordinary uses of police powers. Brandeis's homage to a somewhat mythical founding notwithstanding, their outlooks were thoroughly modern in their disavowal of ultimate truth and repudiation of a reflexive deference to police powers. As value judgments, they are not immune from questioning. Why should advocacy of violence, or urging illegal acts, be tolerated in the name of free expression? Why must the state abide advocacy of its own elimination? Why must there be an immediate consequence for the speech to be prosecuted, as opposed to one somewhat more remotely, especially if it were a really serious harm, such as terrorists flying planes into buildings? Is the state supposed to wait until the eleventh hour? All of these questions were on the table, and the Court continues to refine its answers to them.

A. Free Expression—From World War I to the Cold War

From *Fiske v. Kansas* in 1927 until nearly the end of the 1940s, the Court upheld free expression claims in a variety of settings. During this period the Court begin to define more systematically than before what types of speech could be outlawed and the

761. Whitney v. United States, 274 U.S. 357, 377–78 (1927) (emphasis added).
762. *Id.* at 375.
763. *Id.*
764. *Id.* at 374.

methods by which it could be regulated. Once the Court subjected state actions to the First Amendment, entirely new kinds of claims were presented alongside replays of the older decisions. By the end of the 1930s, the doctrine of substantive due process as applied to economic and social legislation was overturned, to be replaced by rational basis review.[765] At the same time that the Court was permitting far more regulation of social and economic issues than it had in anyone's memory, the Justices granted greater freedom from state control for speech and the press.[766] Formally, this was because the Court had recognized the rights of speech and press as ones for which "neither liberty nor Justice would exist if they were sacrificed."[767] Why? It was no longer possible to argue that since liberty of contract was protected by the Due Process Clause, ergo freedom of expression must be as well. As noted, the new answer was some version of footnote four of *Carolene Products*, that speech had an elevated status under the Constitution due to its indispensability to the democratic process, particularly to correcting legislative errors.[768] Most other societal issues were matters of policy judgment, and free speech was essential to reaching the optimal outcomes.[769]

A major part of this abrupt development took place as the Court reconsidered its approach to speech by political dissidents. Three different cases in the 1930s upheld the speech rights of Communists. The first opportunity came when the Justices reviewed a conviction under a "red flag" statute.[770] Along with criminal syndicalism laws, many states made it a crime to display a red flag as an expression of resistance to government or disloyalty.[771] In 1919 alone, twenty-seven states passed laws of this type.[772] California's law made it a felony to display a red flag or banner in a public place or assembly "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a

765. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 329–30 (1996).
766. *Id.*
767. Palko v. Connecticut, 302 U.S. 319, 326 (1937).
768. *See* White, *supra* note 765, at 301.
769. *Id.*
770. GOLDSTEIN, *supra* note 671, at 147 (twenty-seven red flag laws were passed in 1919).
771. *Id.*
772. *Id.*

seditious character."[773] Yetta Stromberg was a nineteen-year old California woman who worked at a summer camp for children under the auspices of the Young Communist League, itself associated with the Communist Party.[774] Each morning she directed a flag-raising ceremony at which "a red flag, 'a camp-made reproduction of the flag of Soviet Russia,'" was raised while "the children stood at salute and recited a pledge of allegiance 'to the workers' red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class.'"[775] (Sounds like a fun camp.) For this activity, Stromberg received up to ten years in prison under the state red flag law.

Chief Justice Hughes, writing for a majority of six, found the first part of the statute unconstitutional (display of a red flag "as a sign, symbol or emblem of opposition to organized government").[776] Hughes pronounced the statute "vague and indefinite," a conclusion in accord with the California Supreme Court's own judgment.[777] By that court's account, the law could be "'construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations.'"[778] Given this possibility, Hughes found the statute repugnant to the Fourteenth Amendment: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[779]

Hughes's association of free speech with democracy and social stability was a world away from the authoritarian tones displayed by the Court a decade earlier. Hughes did not explain how flying a red flag constituted "free political discussion," but he must have thought that purely symbolic representations qualified as free expression for the message it conveyed. Many years later, the Court repeatedly drew upon Hughes's homage to the necessity of "free political discussion" in formulating the modern judicial approach to the First Amendment. Quoting Hughes, Justice Brennan wrote

773. Stromberg v. California, 283 U.S. 359, 361 (1931).
774. *Id.* at 362.
775. *Id.*
776. *Id.* at 369–70.
777. *Id.* at 369.
778. *Id.* at 366 (quoting People v. Mintz, 290 P. 93, 97 (Cal. Ct. App. 1930)).
779. *Stromberg*, 283 U.S. at 369.

for the Court in 1980 that political expression "'has always rested on the highest rung of the hierarchy of First Amendment values'".[780]

Six years later, in 1937, the Court decided two more cases that followed *Fiske* and *Stromberg* in closely examining the justifications given by the state for imprisoning radical activists. In the first of these cases, *De Jonge v. Oregon*,[781] the defendant was sentenced to seven years under a syndicalism statute for organizing a meeting in Portland under the auspices of the Communist Party.[782] It had been a public gathering—most of the attendees were not Communists—at which people discussed a variety of local concerns, including allegations of illegal police activities.[783] Chief Justice's Hughes's opinion for a unanimous Court rejected the state's theory that De Jonge could be punished merely for holding a meeting to express community grievances when that the session was entirely orderly.[784] "However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party."[785] Rejecting that result, Hughes made the most pointed free speech statement yet to come from the Court: "Freedom of speech and of the press are *fundamental rights* which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution."[786] Subsequent opinions emphasized that the term "fundamental right" was "not an empty one and was not lightly used" in *De Jonge*.[787] "It reflects," Justice Owen J. Roberts wrote for the Court in 1939, "the belief of the framers of the Constitution that exercise of the rights [of freedom of speech and press] lie[at the foundation of free government by free men."[788] Furthermore, another right was involved—freedom of association: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[789]

780. Carey v. Brown, 447 U.S. 455, 467 (1980) (quoting *Stromberg*, 283 U.S. at 369).
781. 299 U.S. 353 (1937).
782. *Id.* at 357.
783. *Id.*
784. *See id.* at 362.
785. *Id.*
786. *Id.* at 364 (emphasis added).
787. *See* Schneider v. New Jersey, 308 U.S. 147, 151 (1939).
788. *Id.* at 150–51.
789. *Id.*

A few months thereafter, the Court strengthened its conclusion in *De Jonge* by protecting the organizational activities of a Communist in Georgia.[790] At the time of his offense, Angelo Herndon was a nineteen-year old African-American recruiter for the Communist Party in Georgia and he was attempting to set up a Communist-affiliated council in Atlanta to deal with unemployment. Herndon was either a very brave or very foolish fellow, or perhaps both. He already had riled authorities by leading a sizeable demonstration demanding jobs and welfare benefits. "Frightened county administrators publicly responded with an emergency appropriation of six thousand dollars. Privately, though, they complained to law enforcement officials about this Communist-inspired activity."[791]

Georgia responded by accusing Herndon of organizing a Communist Party branch to incite riots, resistance to authority and ultimately overthrow of the state.[792] He was convicted and sentenced from eighteen to twenty years imprisonment.[793] (The jury recommended leniency; Herndon could have received a death sentence for his crime.)[794] As in *Fiske*, the state presented no evidence to support its claim that the party was planning illegal acts.[795] Meetings arranged by Herndon discussed such innocuous subjects as unemployment compensation.[796] Blank membership cards found in Herndon's possession proclaimed the "revolutionary" aspirations of the party,[797] but that was not good enough for Justice Roberts, whose majority opinion reversed the conviction.[798] (Still, all totaled, Herndon was incarcerated for five years before being exonerated by the Court.)[799]

For the first time since *Schenck* in 1919, the Court in *Herndon* invoked the "clear and present danger doctrine,"[800] only enhanced by stressing the need for proximity between the speech and illegal acts: "[t]his vague declaration falls short of an attempt to bring

790. *See* Herndon v. Lowry, 301 U.S. 242 (1937).
791. Charles H. Martin, *Communists and Blacks: The ILO and the Angelo Herndon Case*, 64 J. NEGRO HIST. 131, 131 (1979).
792. *Herndon*, 301 U.S. at 245.
793. *Id.* at 243–44.
794. Martin, *supra* note 791, at 132.
795. *Herndon*, 301 U.S. at 248–49.
796. *Id.* at 249.
797. *Id.*
798. *See id.* at 259–60.
799. Martin, *supra* note 791, at 132.
800. *Herndon*, 301 U.S. at 255.

about insurrection *either immediately or within a reasonable time*, but amounts merely to a statement of ultimate ideals."[801] No evidence was introduced establishing that Herndon "advocated, by speech or written word, at meetings or elsewhere, any doctrine or action implying such forcible subversion."[802] Rejecting the state's argument that Herndon's activities had "a dangerous tendency," Roberts put several centuries of doctrine to rest with a few lines: "The question thus proposed to a jury involves pure speculation as to future trends of thought and action."[803] Conjecture was unacceptable when the fundamental right to speak was at stake:

> Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection.[804]

For several decades, the Court relied on the "clear and present danger" standard for speech cases, invoking it in a variety of settings, although not always with consistent application. A leading decision in 1940, *Cantwell v. Connecticut*,[805] was highly influential in tightening the standard for finding speech to be a clear and present danger. Jesse Cantwell, a Jehovah's Witness, was proselytizing with the aid of a phonograph on a sidewalk in New Haven, Connecticut.[806] It was a tough site for gaining converts, as the neighborhood was overwhelmingly Roman Catholic.[807] Nonetheless, two men agreed to listen to the record.[808] They were "highly offended" by what they heard.[809] One of them said he felt like hitting Cantwell and the other reported "that he was tempted to throw Cantwell off the street."[810] Justice Roberts again wrote the Court's opinion, describing the recording as a "general attack on all organized religious systems as instruments of Satan and injurious to man," with particular condemnation of Roman

801. *Id.* at 250.
802. *Id.* at 253.
803. *Id.* at 263.
804. *Id.* at 262.
805. 310 U.S. 296 (1940).
806. *Id.* at 301.
807. *Id.*
808. *Id.* at 302–03.
809. *Id.* at 309.
810. *Id.*

Catholicism.[811] The words "naturally would offend not only persons of that persuasion," Roberts continued, "but all others who respect the honestly held religious faith of their fellows."[812] No fisticuffs occurred, however, as Cantwell beat a hasty retreat with his Victrola rather than face a thrashing.[813] Subsequently, he was charged with inciting others to breach of the peace.[814]

Reversing Cantwell's conviction, Justice Roberts began his analysis by setting out the guidelines for judging whether a clear and present danger existed:

> No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.[815]

In following this formula, Justice Roberts cautioned, "a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."[816] But hadn't Cantwell created an "immediate threat" to public order, saved only by his swift retreat? Roberts's response did not so much answer this question as divert the inquiry to another issue: intent. Cantwell claimed that he had not intended "to insult or affront the hearers by playing the record."[817] All he wished, Roberts reported, was "to interest them in his propaganda."[818] Roberts, however, concluded that the speaker's intent was not necessarily determinative: "One may . . . be guilty of the offense if he commit acts or make[s] statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended."[819] A person was assumed to know that certain expressions are inherently likely to cause breaches of the peace.

811. *Id.*
812. *Id.*
813. *See id.*
814. *Id.* at 303.
815. *Id.* at 308.
816. *Id.*
817. *Id.* at 309.
818. *Id.*
819. *Id.*

"Decisions to this effect are many," Roberts explained, "but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer."[820] The Court was not, in other words, willing to protect all manner of insults under the aegis of the First Amendment. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[821] But measured by this standard, Cantwell was innocent, according to Roberts:

> We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.[822]

Untangling these points, *Cantwell* both clarified the meaning of clear and present danger while introducing new complexities. For First Amendment purposes, the speaker's subjective intent was no longer determinative. The issue became an objective one: under the circumstances, were the words likely to provoke an *immediate* hostile response? Were the words "profane, indecent, or abusive remarks directed to the person of the hearer"?[823] Moreover, in judging the circumstances, the Court included the "bearing" of the speaker—Cantwell was neither truculent nor threatening.[824] Words alone were not necessarily conclusive.

Cantwell squared perfectly with a 1942 case, *Chaplinsky v. New Hampshire*,[825] known to all students of the First Amendment as the "fighting words" case. Yet another Jehovah's Witness was involved.[826] (It has been observed more than once that modern free speech law owes much to the litigiousness of this sect,[827] which

820. *Id.*
821. *Id.* at 309–10.
822. *Id.* at 310.
823. *Id.* at 309.
824. *Id.* at 310.
825. 315 U.S. 568 (1942).
826. *Id.* at 569.
827. *See, e.g.*, SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 18, at 126-27 (2000); Patrick J. Flynn, "*Writing Their Faith into The Laws of the Land:" Jehovah's Witnesses*

resulted in twenty-three decisions by the Supreme Court between 1938 and 1946.[828]) Walter Chaplinsky was distributing his religious literature on a busy street corner in Rochester, New Hampshire, while "denouncing all religion as a 'racket,'"[829] presumably exempting his own denomination from the charge. Apparently the crowd grew either "restless" or "a riot was under way," depending on which version is credited.[830] In any event, Chaplinsky was led away by a police officer.[831] At some point, they encountered the City Marshal, who exchanged words with Chaplinsky.[832] It is unclear who said what first. Chaplinsky claimed that he demanded that the Marshal arrest the troublemakers in the crowd, and that in response he was cursed by the officer.[833] During this interview, according to the criminal complaint, Chaplinsky uttered the words that led to his conviction: "You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[834] Chaplinsky admitted that he said this, except that he denied invoking "the name of the Deity."[835]

Chaplinsky was convicted under a statute that apparently aimed at enforcing a degree of civility in public speakers.[836] It was illegal on a street or other public place in New Hampshire to address a person with "any offensive, derisive or annoying word," or call someone "by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."[837] Earlier the New Hampshire Supreme Court limited the statute's coverage to words spoken in a "face-to-face" encounter that had "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[838] As was well known, Justice Frank Murphy wrote for a

and the Supreme Court's Battle for the Meaning of the Free Exercise Clause, 1939-1945, 10 TEX. J. ON C.L. & C.R. 1, 1–2 (2004).

828. *See* Neil M. Richards, *Book Review: The 'Good War,' The Jehovah's Witnesses, and the First Amendment*, 87 VA. L. REV. 781, 785 (2001).

829. *Chaplinsky*, 315 U.S. at 569–70.

830. *Id.* at 570.

831. *Id.*

832. *Id.*

833. *Id.*

834. *Id.* at 569.

835. *Id.* at 570.

836. *Id.* at 569.

837. *Id.*

838. *Id.* at 573.

unanimous Court, "[t]he English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile."[839] Fighting words were those choice bits of language that, "as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings."[840] As in *Cantwell*, a supposedly objective test was to be applied to detect words with pugnacious potential: "what men of common intelligence would understand would be words likely to cause an average addressee to fight."[841] (No mention was made of the average woman.)

Chaplinsky's outburst did not qualify for First Amendment protection under this standard. Justice Murphy gave a cursory explanation: "Argument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[842] What would count as "fighting words," then, would vary according to the sensibilities of the local populace as reflected by the jury and the makeup of the appellate court. Needless to say, that tended to undermine the objectiveness of the standard.

In the year between *Cantwell* and *Chaplinsky*, the Court had another occasion to shrink the contours of speech that counted as a clear and present danger. Writing in *Bridges v. California*, Justice Black summarized the Court's thinking in the early 1940s: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[843] A mere "inherent tendency" of speech to cause harm was not enough under the First Amendment.[844] Well, yes, this test had "emerged," but as Black's citations showed, the authority for this restatement of clear and present danger came mostly from the dissenting opinions of Brandeis. Added to that, Black took the occasion to assert that the First Amendment should not be interpreted in accordance with

839. *Id.*
840. *Id.*
841. *Id.*
842. *Id.* at 574.
843. Bridges v. California, 314 U.S. 252, 263 (1941).
844. *Id.* at 273.

English precedent. It was irrelevant what contempt powers English judges might have had in the eighteenth century, he concluded:

> [T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press."
>
> . . . .
>
> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed.[845]

The case in which Black wrote these lines, *Bridges v. California*, developed out of the labor battles in California prior to World War II. Actually the case combined two separate judicial proceedings.[846] In both, defendants had been held in criminal contempt for remarks they made about ongoing cases in California courts.[847] One of the contempt cases involved the longshore workers' leader Harry Bridges, who had played a key role in organizing a massive strike up and down the Pacific Coast in 1934.[848] Later, Bridges became embroiled in a dispute over which union—the A.F.L. or the C.I.O—would represent dockworkers. While a decision on the matter was pending in court, Bridges sent a telegram to the Secretary of Labor in which he predicted that a ruling contrary to his side's interest would result in a strike that "would tie up the port of Los Angeles and involve the entire Pacific Coast."[849] Bridges had some credibility in this regard. Not amused, the judge hearing the case found Bridges in contempt and fined him.[850]

The second case decided with *Bridges'* involved the notoriously anti-union *Los Angeles Times*, which had published three editorials concerning the pending sentencing of two union members for violent acts during a strike.[851] Under the headline "Probation for

845. *Id.* at 264–65 (quoting Henry Schofield, *Freedom of the Press in the United States*, 9 PUBLICATIONS OF THE AM. SOC. SOC'Y 67, 76 (1914)).

846. *Id.* at 258.

847. *Id.*

848. *See generally* Robert W. Cherny, *The Making of a Labor Radical, Harry Bridges: 1901-1934*, 64 PAC. HIST. REV. 363 (1995).

849. *Bridges*, 314 U.S. at 258.

850. *Id.* at 278.

851. *Id.* at 298.

Gorillas?" one of the editorials addressed the judge and defendants by name, and said that the judge would "make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."[852] (The jute mill was a reference to one of the least desirable prisoner jobs at San Quentin Penitentiary, turning raw jute into burlap bags.)[853] Two specifically identified individuals, the *Times* asserted, were "members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas," and did not deserve probation.[854] (Dave Beck was the Teamsters' West Coast organizer.) For this unsolicited advice to the judge, the *Times*' publisher and its managing editor were fined for contempt of court.[855]

After reciting the clear and present danger test, Black then retooled it by turning to a method of reasoning that heretofore had been missing from speech cases: an overt balancing process in which all of the consequences to free expression from upholding the contempt sanctions would be weighed against the state's asserted interest in protecting the judicial process from undue influence. Black first put on the scale an issue that had not figured explicitly in prior cases: the liberty to be lost by sustaining the restraint on speech. "For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," Black stated as an opening premise.[856] Labor conflicts were hot news items at that moment. In effect, the contempt orders "produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height."[857] On the other hand, the assumption that judges would be intimidated by such writings could not be credited. Both judges involved were fully aware of the likely reactions to their decisions, regardless of the publicity created by the alleged contemnors. More fundamentally, the assumption that judges might be swayed by such external pressure "would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot

852. *Id.* at 298–99.

853. Miriam Allen De Ford, *"Vacation" at San Quentin*, THE NATION, Aug. 1, 1923.

854. *Bridges*, 314 U.S. at 298.

855. *Id.* at 258–59, 299–300. *See generally* Robert E. Herman, *The Los Angeles Times Case: Right of Press to Comment on "Pending Cases,"* 48 YALE L.J. 54 (1938).

856. *Id.* at 270.

857. *Id.* at 268.

accept as a major premise."[858] Considering the "negligible" effect of the writings on the adjudications versus the substantial impact on discouraging comment about the cases, the balance fell on the side of allowing publication.[859] Put differently, there was no clear danger, much less a serious or imminent one.[860] Weighed against that was the urgency of speaking at the precise moment when public policy was being made.

Cantwell, *Chaplinsky*, and *Bridges* together imposed tight limits on what speech would be found to present a clear and present danger of inciting violence or other criminal conduct. Only immediate and serious dangers counted. Speakers were still responsible for their words, as when the utterances themselves were criminal (for example, a threat) or amounted to an in-your-face insult. Cantwell had not been personally abusive, he was not "truculent," and in that circumstance he could not be punished even though the recording outraged his listeners. Neither *Chaplinsky* nor *Cantwell* provided much of an explanation for why fighting words were unprotected by the First Amendment. Why not demand that the insulted person walk away instead of throwing a punch? Shouldn't police officers be expected to have especially thick skins? Realism apparently accounted for the answer in *Chaplinsky*: People often don't back down. They punch, pummel, stab, and shoot each other. Knowing this, the Court continued to think that society could defuse imminent violence, which otherwise might wind up hurting innocent people. As to *Bridges*, the Court went further than any previous opinion for the Court in emphasizing the importance of public discussion of governmental affairs, including of the judiciary.

Each of these cases took into account the gravity of the evil that might flow from not controlling speech. It remained to be seen how the Court would assess the balance when the facts were closer to the World War I speech cases. Only a few cases in the 1940s provided an opportunity for the Court to consider the impact of national security on free expression. Overall, however, the World War II record of the government in regard to civil

858. *Id.* at 273.

859. *See id.* at 274.

860. *See id.* *See also* Craig v. Harney, 331 U.S. 367, 377 (1947) (holding contempt sanction for newspaper's unfair criticism of trial judge not a clear and present danger); Pennekamp v. Florida, 328 U.S. 331, 348–50 (1946) (holding no clear and present danger was created by editorials and cartoon accusing circuit judges of favoring criminal defendants).

liberties was an enormous change from the previous war, at least as far as harassment of the radical left went. According to an ACLU study in 1944, there was an "extraordinary and unexpected record of the first two years (of the war) in freedom of debate and dissent on all public issues," with only a "comparatively slight resort to wartime measures of control or repression of opinion."[861] Approximately 200 individuals were charged with sedition or violation of the Espionage Act during the conflict, and these were mostly supporters of Germany or Nazism.[862] Few state cases were brought.[863] In the first year of the war, the post office revoked mailing privileges for seventy newspapers under the Espionage Act.[864] Almost none of these cases reached the Court. Yet when the Court did become involved, the Justices were far more skeptical of government claims than their predecessors, which is interesting considering that these were the same men who produced *Korematsu v. United States*. Several reasons can be cited for the comparatively light treatment of dissenters in World War II. Support for the war among Americans was nearly universal. Because the U.S. and the Soviet Union were allies, American Communists likewise backed the military effort, giving the government less of a reason to prosecute them. Finally, on the whole, Roosevelt's administration was more inclined to respect civil liberties than Wilson's did, although FDR had little regard for dissenters.[865]

In *Taylor v. Mississippi*,[866] a 1943 case, three Jehovah's Witnesses were convicted under a Mississippi law criminalizing, among other things, any communication intended to induce disloyalty or disrespect for the flag or government of the United States or Mississippi.[867] They passed out literature claiming that every nation on earth was "under the influence and control of the demons," and that America should remain neutral in the war.[868] Saluting the flag "amounted to a contemptible form of primitive idol worship."[869]

861. American Civil Liberties Union, *Annual Report* 1943-44, at 5 (1944), *quoted in* GOLDSTEIN, *supra* note 671, at 262–63.
862. GOLDSTEIN, *supra* note 671, at 268.
863. *Id.* at 281–83.
864. *Id.* at 268.
865. *See generally* RICHARD W. STEELE, FREE SPEECH IN THE GOOD WAR (1999) (discussing free expression during World War II).
866. 319 U.S. 583, 588 (1943).
867. *Id.* at 588.
868. *Id.* at n.3.
869. *Id.* at 587.

One of the defendants told two women whose sons had died in the war "that it was wrong for our President to send our boys across in uniform to fight our enemies; that it was wrong to fight our enemies; that these boys were being shot down for no purpose at all . . . ."[870] These were the sorts of expressions that had earned stiff prison sentences in World War I. Mississippi gave the defendants up to ten years in the penitentiary. In reversing, the Court demonstrated that it was unwilling to allow punishment for disloyal speech (or just incredibly insensitive speech). On behalf of a unanimous Court, Justice Roberts wrote that the defendants had not made their declarations "with an evil or sinister purpose," or "advocated or incited subversive action against the nation or state or to have threatened any clear and present danger to our institutions or our government."[871] All they had "communicated were their beliefs and opinions concerning domestic measures and trends in national and world affairs."[872]

The Espionage Act of 1917 remained on the books during World War II (Congress increased its penalties in 1940),[873] but the Court reviewed only one conviction under the law.[874] That case involved Elmer Hartzel, who surely counted as one hundred percent American: he was native-born and his ancestors had arrived in the United States 120 years earlier; he served in the Great War, and he pursued a professional career.[875] But he was not in favor of the war against Hitler. In three self-published essays, Hartzel "depict[ed] the war as a gross betrayal of America, denounce[d] our English allies and the Jews and assail[ed] in reckless terms the integrity and patriotism of the President of the United States."[876] Calling for a conversion of the war into a "racial conflict," Hartzel proposed the novel idea of occupying the U.S. "by foreign troops until we are able to stand alone."[877] To disseminate these curious views, Hartzel sent 600 copies of an article he wrote to all sorts of prominent people, including high-ranking military officers and the Infantry Journal.[878] Sentenced to five years in prison, Hartzel went

870. *Id.* at 586.
871. *Id.* at 589–90.
872. *Id.* at 590.
873. Act of Mar. 28, 1940, ch. 72, 54 Stat. 79.
874. Hartzel v. United States, 322 U.S. 680 (1944).
875. *Id.* at 682.
876. *Id.* at 683.
877. *Id.* (quoting Hartzel's work).
878. *Id.* at 683–84.

free on a slim 5-4 vote by the Court.[879]

Other than noting the clear and present danger standard from *Schenck*,[880] Justice Murphy's plurality opinion for four Justices did not cite a single case from the World War I era. Murphy decided the case on a statutory ground, that Hertzel lacked the specific intent required by the law to cause insubordination or obstruction of enlistment.[881] Every point Murphy made, however, conflicted with constitutional and statutory holdings on intent from the decisions two decades earlier:

> There is nothing on the face of the three pamphlets in question to indicate that petitioner intended specifically to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces or to obstruct the recruiting and enlistment service. No direct or affirmative appeals are made to that effect and no mention is made of military personnel or of persons registered under the Selective Training and Service Act. They contain, instead, vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories and gross libels of the President.[882]

As Justice Reed's dissent riposted, this reasoning violated the edict of *Schenck*: "[O]f course the documents would not have been sent unless they had been intended to have some effect."[883] A hallmark of the cases under the prior Espionage Act cases was their inference of subjective intent from the words used in publications or speeches—the writings spoke for themselves as to what the person wished to occur. Reed's group of dissenters included the famed civil libertarian William O. Douglas, along with Frankfurter and Jackson. They thought that there was plenty of evidence of Hartzel's intent.[884] Murphy, nonetheless, was uncertain about Hartzel's state of mind. At best, Hartzel had engaged in a bizarre attempt to influence public policy, which he had a right to do. At worst, he was involved in some sort of German-inspired "psychological warfare" designed "to cause unrest and disloyalty."[885]

879. *Id.* at 689–90.
880. *Id.* at 687.
881. *Id.*
882. *Id.*
883. *Id.* at 693 (*rephrasing* Schenck v. United States, 249 U.S. 47, 51 (1919) (Reed, J., dissenting)).
884. *Id.* at 691–92.
885. *Id.* at 689.

Yet the latter had not been proved, and the fact that Hartzel sent his dispatches to leading public figures undermined that theory. Even accepting the hypothesis that Hartzel meant to inspire disloyalty, it would not change the result, Murphy held:

> [W]hile such iniquitous doctrines may be used under certain circumstances as vehicles for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age, they cannot by themselves be taken as proof beyond a reasonable doubt that petitioner had the narrow intent requisite to a violation of this statute.[886]

He did not explain why this was so, and his interpretation directly conflicted with earlier rulings. *Cantwell* and *Chaplinsky* indicated that there was no obligation under the First Amendment for the government to prove a subjective intent to accomplish the illegal end. Murphy, it should be noted, was construing a statute. Nonetheless, his narrowing interpretation seemed distinctly friendly to Hartzel's claim of free expression. Justice Roberts added the fifth concurring vote, saying only that there was not enough evidence to convict.[887]

What had occurred in the short period between the Holmes and Brandeis dissents and the cases of 1931-1944 was recognition by the Justices that free expression as a constitutional value carried great weight against assertions of the police power. Justice Benjamin Cardozo wrote in 1937 that free speech and free thought formed "the matrix, the indispensable condition, of nearly every other form of freedom."[888] Achieving consensus on the central role of expression in democratic government was a development of enormous consequence, even if the generalized praises for the blessings of free expression left much to be decided. Unlike in the World War I and Red Scare cases, the Court had become skeptical about linking speech to some distant future event. Speakers would not be assumed to intend whatever consequence might conceivably flow from their words. Jury assessments of a speech were no longer immune from judicial review. Doctrinally, the Court had settled on the "clear and present danger" standard for speech and press cases, but it had morphed in meaning since *Schenck* to include consideration of the imminence of the threat, the seriousness of

886. *Id.* at 687.
887. *Id.* at 689–90.
888. Palko v. Connecticut, 302 U.S. 319, 326–27 (1937).

the harm caused by the speech and the social value of public expression in general.

One line of speech cases remained constant during the first half of the century: those dealing with the rights of public employees to engage in political expression. Congress in 1939 enacted the Hatch Act,[889] which continued the longstanding practice of barring federal employees from taking an active part in political campaigns and partisan activities during their private time.[890] *Ex Parte Curtis*, in 1882, had cleared the way for congressional efforts to limit political activity by employees, and the Court had continued that trend through the 1940s, when it upheld the Hatch Act in *United Public Workers of America v. Mitchell*.[891] Experience had vindicated the assumption of the Hatch Act, that enforcing "political neutrality" among government workers promoted "efficiency" in the public workplace.[892] Congress reasonably could have concluded that separating employees from partisan political action would "avoid a tendency toward a one-party system" and dampen the growth of political machines.[893] Employees retained the right to express themselves in "public or private, on public affairs, personalities and matters of public interest," so long as they did not direct their "activities toward party success."[894] Subsequent cases reinforced this conclusion, even as they abandoned the old notion, expressed by Holmes, that public employees possess only those speech rights that their employer permits.

Most of the Court's cases dealing with speech and press through the first three decades of the twentieth century involved substantive limitations on expression. During the 1930s and 1940s, the Court also turned its attention to the methods by which government controlled or regulated speech, usually called "time, place or manner" controls on how, when and where speech is presented. This involved a close examination of the means of enforcing these restrictions, such as licensing systems, administrative censorship and injunctions against expressive activities. Left unimpeded by constitutional constraints, the state

889. Act of August 2, 1939, ch. 410, 53 Stat. 1147 (current version at 5 U.S.C. §§ 1501–03 (2000)).
890. *Id.*
891. 330 U.S. 75 (1947).
892. *Id.* at 97.
893. *Id.* at 100.
894. *Id.*

could have a profound influence on the ability of speakers to communicate with their intended audiences by manipulating these rules.

In 1931, the Court decided one of its most far-reaching First Amendment cases on the means by which speech could be limited, *Near v. Minnesota*.[895] Writing in *Near*, Chief Justice Hughes reinforced the traditional aversion to prior restraints by refusing to allow a state court to enjoin a Minneapolis newspaper, *The Saturday Press*, from publishing future editions that were "malicious, scandalous or defamatory."[896] After nine issues of the weekly had appeared, a court declared—in an action initiated by the local district attorney, Floyd B. Olson—that the periodical was a "public nuisance."[897] Its owners were enjoined "perpetually" from publishing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."[898] If at any time in the future someone claimed that the paper violated the injunction, the defendants would be hauled back before a judge to defend their article on pain of fine or imprisonment.[899] In that proceeding, the publisher would have to "satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends."[900]

If ever there was a periodical that deserved censorship, *The Saturday Press* surely qualified. According to Fred Friendly, a noted professor of journalism at Columbia who wrote a book on the case, the publisher Jay Near was "[a]nti-Catholic, anti-Semitic, antiblack and antilabor."[901] His newspaper amply reflected these sentiments. Chief Justice Hughes gave a sanitized version of its contents: "[T]he articles charged, in substance, that a Jewish gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties."[902] Justice Butler's dissent gave a much more realistic depiction by quoting directly from a 1927 article in

895. 283 U.S. 697 (1931).
896. *Id.* at 706.
897. *Id.*
898. *Id.* at 702–03, 706.
899. *See id.* at 703.
900. *Id.* at 711–12.
901. FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 32 (1981).
902. *Near*, 283 U.S. at 704.

The Saturday Press. Here are some of the choicer pieces:

> There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore WE HAVE Jew GANGSTERS, practically ruling Minneapolis.
>
> Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and [safecracker] in the Twin Cities is a JEW.
>
> I simply state a fact when I say that ninety per cent of the crimes committed against society in this city are committed by Jew gangsters.[903]

Scurrilous as this scandal sheet was, the Court found the injunction to be an unconstitutional prior restraint: "This is of the essence of censorship," Hughes concluded.[904] Immunity from prior restraints was the "the chief purpose"[905] of the First Amendment: "liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[906] Blackstone's influence lived on, as Hughes quoted his maxim against prior restraints. Only "exceptional" circumstances justify a prior restraint such as an injunction.[907] One of those would be wartime, and here Hughes quoted Holmes' admonition in *Schenck* that while soldiers fought otherwise allowable speech could be suppressed. "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[908] The "troopship exception" is sometimes thought of as the sole exclusion from an otherwise total ban on prior restraints. Not so. Hughes went on to list other exceptions:

> On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force

903. *Id.* at 724 n.1 (Buttler, J., dissenting).
904. *Id.* at 713.
905. *Id.*
906. *Id.* at 716.
907. *Id.*
908. *Id.*

> . . . . Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.[909]

These exceptions outlined in *Near* had the potential to become vehicles for suppression of ideas. For example, one could plausibly argue that *The Saturday Press* might have engendered violence. The last sentence in Hughes' statement, which mentions private rights, would permit injunctions in a seemingly unlimited range of civil case involving private parties. One business might get an injunction against a competitor to stop the rival from disparaging its business. As to speech that has "the effect of force,"[910] Hughes gave the example of a permitted injunction against a labor boycott. He also cited *Schenck*, presumably meaning that Charles Schenck might have been enjoined from violating the Espionage Act. Incitements to violence or overthrow of the government likewise could be stopped by court order. Obscenity was subject to advance restraint, presumably by licensing systems or mail censorship. And these were not the only questions left open by *Near*. How much evidence was needed to obtain an injunction if one of these exceptions was invoked? Wouldn't a defendant be denied the right to a jury trial in injunction and contempt proceedings, which are conducted solely by a judge? What standards applied to administrative licensing systems for speech-related activities? Why were these exceptions on the list, as opposed to others? Answers to these and many other questions concerning prior restraints against expression would be given by the Court on numerous occasions in subsequent years. The interesting question to ask is why the Court seemed so worried about an injunction against a publication that hardly deserved any solicitude. A reasonable person could fairly conclude that the world would have been better off had *The Saturday Press* never existed.

Unfortunately, the magazine did exist. Hughes and his colleagues had no interest in protecting vile literature as such. Rather, their aim was to promote a vigorous press in order to maintain vigilance over government: "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon

909. *Id.*
910. *Id.*

publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."[911] For all its egregious faults, *The Saturday Press* was "devoted to charges against public officers" relating "to the prevalence and protection of crime."[912] In fact, District Attorney Olson, the one who brought the injunction action, was among those the newspaper criticized for ceding the city to mobsters.[913] Moreover, gangsters *had* been active in Minneapolis at the time, and some of the most notorious of the lot were Jewish. But the important point was that allowing suppression of the newspaper would permit the same treatment for other, more responsible critics. Hughes fondly recalled Madison's praise for the press, written as part of his Virginia Resolution. It was "to the press alone," Madison wrote, "chequered as it is with abuses," that

> the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness[.][914]

Hughes contended that the need for a watchful and fearless press was even greater now than when Madison wrote:

> [T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities.[915]

The press had become an indispensable check on government—an institution essential to the proper and orderly functioning of society.[916]

911. *Id.* at 718.
912. *Id.* at 711.
913. *Id.* at 704.
914. *Id.* at 718 (quoting James Madison, *Report on the Virginia Resolutions* (1799), *reprinted in* MADISON WRITINGS, *supra* note 149, at 544.
915. *Id.* at 719–20.
916. Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation*

By the way, there was an interesting denouement to the *Near* story. Howard Guilford was the editor of *The Saturday Press* at the time the stories appeared that provoked the district attorney to seek an injunction. On September 8, 1934, Guilford was executed in his car—gangland-style, by shotgun blasts—one of several assassinations of editors in Minneapolis during this period.[917] Olson later was elected governor of Minnesota, running on a Farmer-Labor Party platform that included the charge: "Capitalism has failed and immediate steps must be taken by the people to abolish capitalism in a peaceful and lawful manner . . . ."[918]

In protecting the vital role of the press from censorship, inevitably the freedom conferred would be abused. Again Madison supplied the answer for Hughes, that "a more serious public evil would be caused by authority to prevent publication."[919] Madison reasoned that "[s]ome degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press."[920] According to Madison's account of contemporary practices, the states had decided that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits."[921] This did not mean that the press or a speaker had license to say just anything—they could still be held accountable after the fact in a criminal or civil proceeding. Hughes also embraced the other aspect of Blackstone's legacy, that:

> punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions.[922]

Malicious libel was a crime in most states, and the Court had no problem with its prosecution. "Public officers, whose character and conduct remain open to debate and free discussion in the

and Negative First Amendment Theory, 34 UCLA L. REV. 1405, 1454 (1987).

917. MARDA L. WOODBURY, STOPPING THE PRESSES: THE MURDER OF WALTER W. LIGGETT 40 (1998).

918. *See* George W. Bergquist, *The Dilemma of the Farmer-Labor Party*, 3 PUB. OPINION Q. 476, 477 (1939) (quoting Farmer-Labor platform).

919. *Near*, 283 U.S. at 722.

920. *Id.* at 718 (quoting MADISON WRITINGS, *supra* note 149, at 544).

921. *Id.* (quoting MADISON WRITINGS, *supra* note 149, at 544).

922. *Id.* at 715.

press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."[923]

Subsequent cases showed that the Court was serious in disapproving prior judicial restraints on speech. A 1945 decision, *Thomas v. Collins*,[924] illustrates this fundamental point. Texas had a law requiring union solicitors to register with the state.[925] Collins, the president of an international union, traveled to Texas for the sole purpose of giving a speech as part of an organizing campaign for workers at a refinery.[926] Unbeknownst to Collins, Texas obtained a restraining order that ordered him not to solicit members for the union without first registering with the state.[927] Collins delivered his speech anyway, urging plant workers to join the union and choose it as their bargaining agent at an upcoming election.[928] For this, Collins was held in contempt of court, fined, and sent to jail for three days.[929] A major problem for Collins' defense was the accepted practice of requiring various professions to obtain licenses from the state—Texas contended that its law mandated nothing more than a simple business license.[930] For a majority of the Court, however, the restraining order was suspicious: it was issued in explicit anticipation of the speech and to restrain Thomas from "uttering . . . any language which could be taken as solicitation."[931] Most anything Collins might say on behalf of the union could be characterized as soliciting prospective members. "The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. A speaker in such circumstances could avoid the words 'solicit,' 'invite,' 'join.' It would be impossible to avoid the idea."[932] Thus, the case came down to this: Texas was demanding that a person obtain a license to give a speech. Justice Wiley Rutledge wrote on behalf of the majority that

923. *Id.* at 718–19.
924. 323 U.S. 516 (1945).
925. *Id.* at 518–19.
926. *Id.* at 520–21.
927. *Id.* at 521.
928. *Id,* at 522.
929. *Id.* at 523–24.
930. *Id.* at 526.
931. *Id.* at 528.
932. *Id.* at 534.

> a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers.[933]

Speech may be controlled through limiting the *methods* by which communication occurs. Bans on picketing, handbilling, doorbelling, or using amplified sound, for example, limit a speaker's access to an audience. Parade permit systems not only preclude spontaneous demonstrations, but may be abused by authorities if there are no standards to guide their discretion in deciding whether to issue the license. Special taxes on the press might drive media out of business or warn them to toe the line. Through a series of cases decided beginning in 1937, the Court significantly constrained states and municipalities from banning speech activities at public locations such as streets and parks. It also greatly curbed the authority of officials to deny permits for public speaking activities.

On the first point, the Court looked dimly on laws that forbade entire modes of communication, such as handbilling or picketing. Chief Justice Hughes wrote the opinion for the Court in *Lovell v. City of Griffin*,[934] invalidating a city ordinance banning the distribution of "literature of any kind . . . without first obtaining written permission from the City Manager . . . ."[935] Alma Lovell, a Jehovah's Witness, defied the law as she handed out literature promoting her religion. She had refused to obtain the requisite permit because, as a tenet of her faith, "she regarded herself as sent 'by Jehovah to do His work' and that such an application would have been 'an act of disobedience to His commandment.'"[936] Taking note of the "broad sweep" of the ordinance,[937] which literally applied to "the distribution of literature of any kind at any time, at any place, and in any manner[,]"[938] Hughes held it "invalid on its face."[939] He identified the flaw in the system as the same one

933. *Id.* at 539.
934. 303 U.S. 444 (1938).
935. *Id.* at 447.
936. *Id.* at 448.
937. *Id.* at 450.
938. *Id.* at 451.
939. *Id.*

infecting *Near*: the law "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor."[940]

Two separate issues were implicated in cases such as *Lovell*. The first was the comprehensive ban on distributing literature and canvassing without a permit, and the second concerned the limitless discretion given to city officials in approving them. *Lovell* lumped these separate features of the law together, whereas later cases would determine that each was a fatal constitutional flaw. The first issue was addressed squarely in a 1939 decision, *Schneider v. New Jersey*,[941] which overturned four different city ordinances in as many states. In varying ways, the ordinances banned handbilling, door-to-door solicitation, and posting signs on public streets. Municipal authorities defended these laws as reasonable means to maintain order on the streets, prevent fraud in solicitation, and discourage littering.

Justice Roberts' majority opinion in *Schneider* did not doubt that the first of these justifications was legitimate: cities could enact reasonable limits on the time, place, and manner of speech. "For example," Roberts continued, "a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic . . . ."[942] A total ban, however, excessively "diminishes the exercise of rights so vital to the maintenance of democratic institutions."[943] As for the littering caused by discarded flyers, the harm to the public from such esthetic insults did not outweigh the rights of the handbillers:

> Any burden imposed upon the city authorities in cleaning and caring for the streets as an *indirect consequence* of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets. [944]

940. *Id.*
941. 308 U.S. 147 (1939).
942. *Id.* at 160.
943. *Id.* at 161.
944. *Id.* at 162 (emphasis added).

True enough in theory, although it is far easier to stop handbillers than to arrest litterers or pick up their rejected papers. Littering inevitably accompanies handbilling—unless the police assign a cop to every canvasser—and the city will be stuck paying the tab for cleaning up the debris. Implicitly, the Court balanced the societal costs of more trash in the streets against the democratic values advanced by communicating through handing out literature to the public, concluding that "the streets are natural and proper places for the dissemination of information and opinion . . . ."[945]

Lovell was followed by a pair of 1940 cases that invalidated laws prohibiting picketing of businesses in labor disputes,[946] which the Court said hampered efforts to "enlighten the public on the nature and causes of a labor dispute."[947] In one of these cases, *Thornhill v. Alabama*, the State argued that the law was necessary to protect the "community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing."[948] That excuse flunked the clear-and-present-danger smell test, inasmuch as there was no "inherent" reason why labor picketing would provoke a breach of the peace, which in any event could be dealt with by arresting those who were provoked to violate the law.[949] Justice Murphy's majority opinion (only McReynolds dissented) extolled the public purposes served by free speech in labor matters, emphasizing that the issues being discussed went beyond the economic interests of the immediate parties: "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[950] A prime function of the First Amendment was to facilitate democratic change, Murphy asserted, so the party controlling the government cannot stack the rules about speech in order to retard a fair public discussion of the issues.[951] "[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take

945. *Id.* at 163.
946. *See* Carlson v. California, 310 U.S. 106 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940).
947. *Thornhill*, 310 U.S. at 104.
948. *Id.* at 105.
949. *Id.*
950. *Id.* at 103.
951. *Id.* at 104.

action inconsistent with its interests."[952] Justice Holmes then received posthumous vindication as Justice Murphy paraphrased his dissent in *Abrams*: "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[953]

Although labor demonstrations could not be banned outright, neither were they immune from sufficiently narrow regulations. Violence accompanying picketing was fair game for injunctions, because "the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence."[954] These were "exceptional cases," nonetheless, and a state could not "enjoin peaceful picketing merely because it may provoke violence in others."[955] A state also could prohibit secondary boycotts by unions, in which the target of the protest was not directly involved in the alleged unfair labor practices. Picketing in support of an illegal boycott could be proscribed because they were furthered illegal restraints on trade.[956]

Streets were not the only natural places to espouse one's views. The doorsteps of peoples' homes also qualified, it seemed. That was the upshot of a 1943 decision, *Martin v. City of Struthers*,[957] in an opinion by Justice Black. The City of Struthers, Ohio, had a law forbidding knocking on doors or ringing doorbells in order to distribute "handbills, circulars or other advertisements . . . ."[958]

952. *Id.*

953. *Id.* at 104–05 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See, e.g.*, Am. Fed'n of Labor v. Swing, 312 U.S. 321 (1941) (holding that State cannot exclusively limit picketing in labor case in which the conflict is between an employer and its own employees); Carlson v. California, 310 U.S. 106 (1940) (striking down a California anti-picketing law on the same day *Thornhill* was decided).

954. Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 295 (1941).

955. *Id.* at 296.

956. *See* NLRB v. Retail Store Employees, 447 U.S. 607 (1980) (holding that secondary boycotts and related picketing by unions may be banned); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (picketing in support of secondary boycott not protected by First Amendment). *Cf.* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 425–28 (1990) (finding agreement by court-appointed lawyers for indigent defendants to withhold services unless higher fees were received was an illegal restraint on trade not protected by First Amendment).

957. 319 U.S. 141 (1943).

958. *Id.* at 142.

Again, it was a peripatetic Jehovah's Witness who challenged the law—and won.[959] Justice Black opened the opinion by invoking tradition:

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings.[960]

He went on to connect canvassing with democracy: "Of, course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support . . . . Door to door distribution of circulars is essential to the poorly financed causes of little people."[961] (Black had not forgotten his populist roots as a Senator from Alabama.) Freedom of speech "embraces the right to distribute literature and necessarily protects the right to receive it."[962] Here were two new twists: The recipient of the communication had a right to receive the information and was deprived by not getting a knock on the door. "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."[963] Beyond that, the "little people"[964] needed to use a low-cost means of getting themselves heard, for that was part of democracy. By this understanding, the First Amendment had an imperative: to facilitate democratic discussion.

Despite this high-minded thinking, the City of Struthers had real concerns. As an iron and steel manufacturing town, many of its residents worked nights and slept days. Burglars also had been known to pose as canvassers to check out if anyone was at home. Did these concerns matter? They were entitled to weight, Justice Black answered, "the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution."[965] All of these interests could be accommodated by means short of a flat ban:

959. *Id.*
960. *Id.* at 141.
961. *Id.* at 146.
962. *Id.* at 143 (citation omitted).
963. *Id.* at 146–47.
964. *Id.* at 146.
965. *Id.* at 143.

> The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, [which was] the naked restriction of the dissemination of ideas.[966]

Black offered Struthers an alternative that would meet all of its objectives: A home dweller could put up a "No Solicitation" sign on his door, which the city then could validly enforce with trespass laws.[967]

Lovell and *Martin* thus introduced a principal component of modern First Amendment analysis.[968] When the fundamental right of free speech is at stake, the state must pursue available alternatives to address its legitimate police-power needs—alternatives that are less restrictive of speech. To an extent, not clearly defined, the state must bear the burden of assuring that speech has an opportunity to be heard.

The second concern raised in *Lovell*, standardless administrative discretion, was also present in one of the city ordinances reviewed in *Schneider*, which the Court criticized because a person's "liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion."[969] That officials would abuse their discretion to quash speech was resoundingly demonstrated by a 1939 case arising from Jersey City, New Jersey, *Hague v. Committee for Industrial Organization*.[970] Frank Hague had been the Democratic mayor of Jersey City since 1917 and he would remain so until retiring in 1947 to a role of *éminence grise*. He was the embodiment of the old-time city "boss," who ruled his political machine with absolute authority. Hague also had considerable statewide and even national power due to his ability to deliver Democratic votes by hook or crook. He was known to say, "I am the law," and "I decide. I do. Me."[971]

One of the ways Hague maintained discipline was by tightly controlling public demonstrations. A city law required a permit

966. *Id.* at 147.
967. *See id.* at 147–48.
968. *See id. See also* Lovell v. City of Griffin, 303 U.S. 444 (1938).
969. Schneider v. New Jersey, 308 U.S. 147, 164 (1939).
970. 307 U.S. 496 (1939).
971. RICHARD J. CONNORS, A CYCLE OF POWER: THE CAREER OF JERSEY CITY MAYOR FRANK HAGUE 74 (1971); DAYTON D. MCKEAN, THE BOSS: THE HAGUE MACHINE IN ACTION 270–71 (1940).

from the Director of Public Safety in order to hold any "public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City . . . ."[972] No one received a permit if their views conflicted with those of Hague, whose ruthlessness against opponents was legendary. That meant that the Congress of Industrial Organizations (CIO) was invariably refused permits from the city to hold organizing meetings while others groups were allowed to do so. Hague was not anti-labor, as he courted unions and workers on other occasions. But he regarded the CIO as rife with Communists. CIO organizers were harassed, arrested, frequently beaten by Jersey City police, and unceremoniously thrown out of the county. Justice Roberts' plurality opinion in *Hague* condemned the essentially standardless permit system as an "instrument of arbitrary suppression of free expression of views on national affairs . . . ."[973] Subsequent cases would emphasize that

> an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.[974]

Without specifically saying so, Justice Roberts had infused his First Amendment analysis with equal protection principles. Empowering an official to grant permits without any standards was a recipe for differential treatment according to the biases of the censor. Justice Brandeis made this point in his dissent to a 1921 ruling in which the postmaster was given broad power to determine if mailings violated the Espionage Act. Classifying a mailing as violating the Act obliged the sender to pay a rate from eight to fifteen times higher than that enjoyed by approved magazines and newspapers.[975] Justice Brandeis had protested in vain that the

972. *Hague*, 307 U.S. at 502 n.1.

973. *Id.* at 516.

974. Staub v. City of Baxley, 355 U.S. 313, 322 (1958). *See also* Kunz v. New York, 340 U.S. 290, 294 (1951) (stating that "we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places."); Niemotko v. Maryland, 340 U.S. 268 (1951) (holding no standards at all for use of public park).

975. Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 417 (1921) (Brandeis, J., dissenting).

arbitrary power given to postal officials denied "equal protection of the laws."[976] A 1951 opinion for the Court by Chief Justice Vinson, however, invoked equal protection principles to overturn a Maryland town's practice of vesting discretion in a local official as to whether a public park could be used for meetings. Overturning this system, which inexplicably had been applied to deny Jehovah's Witnesses' use of the park, the Chief Justice linked the First Amendment issues to equal protection: "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body."[977]

A major obstacle for Roberts to overcome was the traditional view that a city, as owner of municipal property, could impose any conditions it wished for use, including no access whatsoever. Roberts challenged the assumption on which this longstanding rule had rested, using lines that would appear over and over in later cases:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[978]

Justice Roberts' homage to the streets and parks as public forums since time immemorial would have come as a shock to the Wobblies who were arrested for speaking on street corners or to the abolitionists who were denied public spaces to meet. If Roberts' vision was something of a fiction, it nonetheless was one that made better theoretical sense than the traditional view that the

976. *Id.* at 432–33.
977. *Niemotko*, 340 U.S. at 272.
978. *Hague*, 307 U.S. at 515–16.

state was the arbitrary master of its property. People must have access to the streets, parks, and other public venues for speech, but not simply because these places literally are owned by the people. If that were the justification, the majority of the people, acting as owners, could vote to block access to opponents, just as a homeowner can toss out an unwelcome guest. The Court's explanation was functional, viewing speech as a means to an end, and hence the public commons must remain free for expression without regard to content in order to facilitate democratic discourse. Allowing the governing party to control access to speaking venues (especially low cost ones) retards political change, as Frank Hague's career attests.

Cantwell v. Connecticut,[979] which we previously surveyed,[980] also invalidated the state's requirement that solicitors of money for alleged religious, charitable, or philanthropic causes first obtain a permit from the Secretary of Public Welfare. Justice Roberts had no doubt "that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon . . . ."[981] Nothing would be wrong with a measure designed to combat fraud that "requir[ed] a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent."[982] Connecticut would not be amiss in prescribing "the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience."[983] The vice of the law in *Cantwell* lay in its authorizing the Secretary of Public Welfare "to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."[984]

One message in *Cantwell* was that the Court did not regard licensing systems for expressive activities as per se unconstitutional. Less than a year later, in *Cox v. New Hampshire*,[985] the Justices

979. 310 U.S. 296 (1940).
980. *See supra* notes 805–24 and accompanying text.
981. *Cantwell*, 310 U.S. at 304.
982. *Id.* at 306.
983. *Id.* at 306–07.
984. *Id.* at 305.
985. 312 U.S. 569 (1941).

confirmed that understanding, rejecting pleas that requiring a permit to speak would amount to a forbidden prior restraint. Sixty-eight Jehovah's Witnesses were arrested for marching throughout the business district of Manchester, New Hampshire, without having obtained the requisite parade permit required by state law. Chief Justice Hughes, in one of his last opinions, upheld the regulation, emphasizing that the state's courts had limited the discretion of licensing officials to considerations of the time, place and manner of parades. No evidence had been introduced to show that the law was administered discriminatorily. Permit systems for demonstrations of this sort were appropriate uses of the state's police power "to secure convenient use of the streets by other travelers, and to minimize the risk of disorder."[986] Advance notice to authorities gave them an opportunity to arrange appropriate policing and "to prevent confusion by overlapping parades or processions . . . ."[987]

How did *Cox* square with the Court's previous holdings castigating prior restraints, including injunctions and licensing systems? The key was the absence of any reason to believe that New Hampshire was attempting to limit speakers due to the content of the message they wished to impart. Nor did its statute engage in overkill by requiring licenses when doing so would serve no legitimate purpose, as in *Thomas v. Collins*.[988] And the law did not preclude the use of entire forms of expression, as occurred when states banned picketing of businesses, handbilling, or door-to-door canvassing. A pair of late 1940s cases illustrates these distinctions. In *Saia v. New York*,[989] the Court objected to a law that allowed the use of amplified sound in public places unless one obtained a permit from the Chief of Police. In addition to there being no standards to guide the Chief's discretion, the ordinance was "not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted."[990] About six months later, however, the Court upheld a ban on "loud and raucous noises" emitted from amplifiers on

986. *Id.* at 576.

987. *Id. See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Carpenters v. Ritter's Cafe, 315 U.S. 722 (1942) (discussing the allowance of restraints on secondary boycotts).

988. *See supra* notes 924–33 and accompanying text.

989. 334 U.S. 558 (1948).

990. *Id.* at 560.

motor vehicles.[991] Protecting the "tranquility of [the] community" was a proper objective, Justice Reed wrote in a plurality opinion.[992] While it would probably be unconstitutional to ban all sound trucks, he allowed, the "[u]nrestrained use throughout a municipality of all sound amplifying devices would be intolerable."[993] Brushing aside the objection that "loud and raucous" was so vague that it conferred discretion on the police, Reed took the side of the "unwilling listener," who was "practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality."[994]

Another method of restraining the press that came before the Court in this period was discriminatory taxation. The principal case, *Grosjean v. American Press Co.*,[995] emerged from Louisiana in the 1930s. Senator Huey P. Long, a demagogue if there ever was one, became piqued at the larger newspapers in the state for their criticisms of his actions, although he supported the smaller presses that remained loyal. At Senator Long's urging, the legislature passed a two percent tax on the gross revenue of newspapers with circulations above 20,000, which just happened to include all but one of the papers that opposed the Kingfish. Senator Long accused "lying newspapers" of waging a "vicious campaign" against him.[996] "For each dollar these papers . . . take in, they tell a lie. There is no reason why the State of Louisiana should not receive two cents for each of these lies."[997] A tax on lies, if it could be collected, would no doubt erase the national debt. Senator Long's plan, however, was recognized immediately as a virtually unveiled attack on press opponents to the political establishment. The taxed newspapers sued on the grounds that the exactions violated freedom of the press and the Equal Protection Clause.[998]

991. Kovacs v. Cooper, 336 U.S. 77, 78 (1949).
992. *Id.* at 83.
993. *Id.* at 81.
994. *Id.* at 86–87.
995. 297 U.S. 233 (1936).
996. Brief of Appellees at 9, Grosjean v. American Press Co., Inc., 297 U.S. 233 (U.S. 1935) (No. 303).
997. *Id.* (quoting circular written by Senator Long and Governor Oscar K. Allen and distributed to state legislators in 1934).
998. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 580 (1983) (discussing history of *Grosjean)*; EMERSON, *supra* note 15, at 418–19. *See generally* RICHARD C. CORTNER, THE KINGFISH AND THE CONSTITUTION: HUEY LONG, THE FIRST AMENDMENT, AND THE EMERGENCE OF MODERN PRESS FREEDOM IN AMERICA (1996).

In striking down the tax, Justice Sutherland recounted the bitter objections to newspaper taxes in England and the colonies.[999] Taxes had been used not for revenue, Sutherland asserted, but "to suppress the publication of comments and criticisms objectionable to the Crown."[1000] Given that history, it was "impossible to believe" that discriminatory taxes were consistent with the First Amendment.[1001] Louisiana's tax was obviously not a neutral revenue device. The tax "is bad," Justice Sutherland concluded, "because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."[1002] Without mentioning Huey Long, it was apparent that the Court was well aware of the brazenly seamy scheme behind the tax. Justice Sutherland used it as an occasion once again to link a free press with effective government:

> The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.[1003]

Grosjean spawned a long line of cases attacking taxes on the press or speakers. As the Court noted in 1983, "the result in *Grosjean* may have been attributable in part to the perception on the part of the Court that the State imposed the tax with an intent to penalize a selected group of newspapers."[1004] Economic regulations and even taxes can be imposed on press organs so long as they are part of an overall scheme that is applicable to businesses generally. Although *Grosjean* did not reach the newspapers' claim that the tax violated the Equal Protection Clause, the Court's

999. *Grosjean*, 297 U.S. at 245–46.
1000. *Id.* at 246.
1001. *Id.* at 248.
1002. *Id.* at 250.
1003. *Id.* *See also* Robert E. Cushman, *Constitutional Law in 1935-36: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1935*, 31 AM. POL. SCI. REV. 253, 271–72 (1937) (discussing the contemporary awareness of the Louisiana tax's purpose).
1004. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 580 (1983).

reasoning indicated its importance to First Amendment reasoning. Had this been any other kind of business, a differential tax based on production would be unexceptional. Because First Amendment considerations are in play, the rules changed. The differential tax had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."[1005]

Taxes on expressive behavior were also found improper despite the absence of discriminatory purpose. A 1943 case, *Murdock v. Pennsylvania*,[1006] invalidated a flat tax on anyone wishing to sell merchandise door-to-door. The law was applied to itinerant Jehovah's Witnesses, who tried to sell religious literature house-to-house in an effort to win converts.[1007] These sales, Justice Douglas explained in his majority opinion, were "'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their order.'"[1008] They were preaching, and "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types."[1009] A flat tax on these activities violated the stricture that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution."[1010] Justice Douglas was drawing a fine distinction here. Prior cases established that license fees could accompany parade permits, "as a regulatory measure to defray the expense" of policing the activities in question.[1011]

By the end of the 1940s, the Court had in place a methodology for analyzing First Amendment cases that would guide developments for the remainder of the century. Basically, it

1005. *Grosjean*, 297 U.S. at 251. *See also Minneapolis Star*, 460 U.S. at 581 (explaining allowable economic regulation of the press); Ark. Writers' Project, Inc. v. Ragland Comm'r of Revenue of Ark., 481 U.S. 221 (1987) (citing other press taxation cases).

1006. 319 U.S. 105 (1943).

1007. *Id.*

1008. *Id.* at 112 (quoting State v. Mead, 300 N.W. 523, 524 (1941)).

1009. *Id.* at 110.

1010. *Id.* at 113.

1011. *Id.* at 116. *See also* Jones v. City of Opelika, 319 U.S. 105 (1943) (invalidating licensing tax for distribution of printed matter); Largent v. Texas, 318 U.S. 418 (1943) (holding that the state cannot prohibit distributing handbills for a religious activity solely because the handbills invite the purchase of religious books or solicit funds for religious purposes); Jamison v. Texas, 318 U.S. 413 (1943) (holding the same). *But see* Cox v. New Hampshire, 312 U.S. 568, 576–77 (1941) (upholding license fee for parade).

divided speech issues into two types. One issue was whether the state could ban a particular expression or method of expression because it presented a clear and present danger.[1012] That test had been refined to require that the danger be at once serious and immediate. In assessing these factors, the Court also took into account the importance of the expression to public understanding, especially about political questions. On several occasions it announced that speech and press occupied a "preferred position" in American society.[1013] At the same time, building upon historical assumptions about appropriate uses of the police powers, the Court declared that specific types of speech were entirely outside the protection of the First Amendment.[1014] In *Chaplinsky*, Justice Murphy noted that there were

> certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[1015]

Why were these types of speech entirely outside the First Amendment's ambit of protection? Justice Murphy explained that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[1016] By contrast, speech that related to issues of public importance, such as politics, economics and industrial relations, received the full protection of the clear and present danger test.[1017] Unquestionably this was a value judgment, although one faithful to historical practice.[1018]

The second issue dealt with the methods of regulating speech, including expression that could not be banned outright without

1012. *See supra* notes 805–24 (discussing *Cantwell* and the clear-and-present-danger test).
1013. *See, e.g.*, Follett v. Town of McCormick, 321 U.S. 573, 575 (1944) (discussing speech as being in a "preferred position"); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).
1014. *See Murdock*, 319 U.S. at 109–10.
1015. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
1016. *Id.* at 572.
1017. *See id.* at 571–72.
1018. *See id.* at 572.

violating the First Amendment.[1019] Speech was subject to various controls that furthered community values while allowing outlets for public expression.[1020] Rules that dictated the time, place and manner of speech could pass judicial examination provided they were administered in ways that precluded official censorship of ideas and were not excessively prohibitory.[1021] "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience," Justice Reed wrote.[1022] Prior restraints were strongly disfavored when they took the form of suppressing the content of speech, as in *Thomas v. Collins*.[1023] Again, this idea accorded with long accepted practice.[1024]

Consequently, the major development that occurred between the end of the Red Scare in the 1920s and the close of the 1940s was a refinement and tightening of the clear and present danger standard. The Court acknowledged explicitly that it was abandoning the "bad tendency" guideline that had served since the beginning of the Republic. It accepted both Justice Holmes' metaphor of the marketplace of ideas and his specific rules on the immediacy and seriousness of the danger. If the Court now had a guiding philosophy, it was that of Justices Holmes and Brandeis: offensive speech must be combated not with repression but rebuttal. Only if dialogue was impossible because of emergency circumstances would it be constitutional for authorities to sanction speech. Almost all of the cases that championed this philosophy involved political speech, and the Court customarily spoke of free speech and press as being essential to democracy and orderly government. Justice Stone, in the *Carolene Products* footnote discussed earlier, stated that "presumption of constitutionality" ordinarily afforded to legislation did not apply to restraints upon the political speech, "interferences with political organizations," and "prohibition of peaceable assembly."[1025] In a concurring opinion in *Hague* the following year, Justice Stone added: "No more grave and important issue can be brought to this Court than that of

1019. *See* Kovacs v. Cooper, 336 U.S. 77, 94 (1949).
1020. *Id.*
1021. *See id.* at 81–83.
1022. *Id.* at 88.
1023. *Id.* at 94 (Frankfurter, J. concurring) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
1024. *Id.* at 88.
1025. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).

freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship . . . ."[1026]

Far more important than developments in technical rules regarding free expression was the Court's recognition of the positive values associated with free speech. A case that closed out the decade of the 1940s illustrates this fact in a dramatic way. Arthur Terminiello, a suspended Catholic priest and controversial anti-Semitic extremist, had been invited to speak at a meeting in Chicago on February 7, 1946 sponsored by the "Christian Veterans of America," a group enthusiastic about Terminiello's beliefs.[1027] Speaking on the theme of "Christ or Chaos—Christian Nationalism or World Communism—Which?"[1028] he warned of "a conspiratorial threat to Christian America from Russia, Communism, the New Deal, Eleanor Roosevelt, and Zionism."[1029] Some 800 people were packed into Chicago's West End Women's Club to hear Terminiello speak while "a howling mob" of several hundred die-hard opponents worked themselves into a froth outside.[1030] A number of Terminiello's foes managed to get inside to stir up trouble.[1031] Eventually the crowd outdoors reached an estimated 1,000 people, completely occupying a city block.[1032] Justice Jackson's dissent gives a more vivid description of the melee than the bland recital in Justice Douglas' majority opinion:

> Those inside the hall could hear the loud noises and hear those on the outside yell, 'Fascists, Hitlers!' and curse words like 'damn Fascists.' Bricks were thrown through the windowpanes before and during the speaking. About 28 windows were broken. . . . [B]ottles, stink bombs and brickbats were thrown. Police were unable to control the mob which kept breaking the windows at the meeting hall, drowning out the speaker's voice at times and breaking in through the back door of the auditorium.

1026. Hague v. Comm. for Indus. Org., 307 U.S. 496, 524 (1939) (Stone, J., concurring).
1027. City of Chicago v. Terminiello, 74 N.E.2d 45, 46 (1947).
1028. *Id.* at 47.
1029. Patrick Schmidt, *"The Dilemma to a Free People": Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence*, 20 LAW & HIST. REV. 517, 519 (2002).
1030. Terminiello v. City of Chicago, 337 U.S. 1, 16 (1949) (Jackson, J., dissenting).
1031. *Id.*
1032. *Id.*

> About 17 of the group outside were arrested by the police.[1033]

Terminiello did not back down, instead hurling his own epithets at the rioters, calling them "slimy scum," "probably" foreigners, and comparing them to snakes and bedbugs.[1034] "Those mobs are chanting; that is the caveman's chant," Terminiello shouted.[1035] His speech was aggressively anti-Semitic, provoking some in the crowd to make vile remarks about Jews.[1036] His listeners in the hall reacted warmly, "stirred . . . not only to cheer and applaud but to expressions of immediate anger, unrest and alarm."[1037]

Terminiello was charged with violating a Chicago ordinance that provided: "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, shall be deemed guilty of disorderly conduct."[1038] At his trial, the judge instructed the jury that "breach of the peace" meant behavior that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or . . . molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[1039] Given that instruction, it was understandable why the jury found Terminiello guilty. Reversing the conviction, Justice Douglas based his opinion upon a premise that sounded in Justice Brandeis' *Whitney* dissent: "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge* . . . it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected."[1040] He added what may have been a dig at Terminiello himself, that it is "[t]he right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."[1041] These principles were violated at their core by the jury instruction.

1033. *Id.*
1034. *Id.* at 26.
1035. *Id.* at 21.
1036. *Id.* at 22.
1037. *Id.*
1038. *Id.* at 2 n.1 (majority opinion). *See* CHICAGO, ILL. , REV. CODE ch. 193, § 1(1) (1939).
1039. *Id.* at 3.
1040. *Id.* at 4. (quoting De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).
1041. *Id.*

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, [citing *Chaplinsky*] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[1042]

What accounts for such an abrupt change of heart by the Court in only a generation? Changes in the Court's personnel naturally make up part of the explanation, but only a part, because the Justices began to turn away from the approach they used during World War I and the Red Scare well before a majority of the Court consisted of Roosevelt appointees. Certainly, in retrospect, some of them regretted the Court's role in the harsh treatment of mostly innocuous individuals. More broadly, these cases were decided amidst a sustained effort since the beginning of the century to protect individual autonomy against state action. As argued earlier, after repudiating *Lochner*, there was all the more reason to invigorate the political processes that maintain the responsiveness of government to the people.[1043] *Carolene Products* had laid down that line: the Court would defer to legislative decisions only if the system of expression permitted free exchange of ideas.[1044]

All of the First Amendment cases considered so far have sprung from efforts by government to suppress speech or at least channel it so as to minimize its socially disruptive effects. One last decision from this period involved the opposite problem—government forcing people to affirm things that they personally reject.[1045] Seemingly unrelated to repressive regulations, compelled speech strikes deeply into the libertarian heart of the First Amendment. The issue was the compulsory pledge of allegiance to the flag in public schools, which many states either required or

1042. *Id.*
1043. *See* pp. 859–60.
1044. United States v. Carolene Prods., 304 U.S. 144, 152 (1938).
1045. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

permitted. Nonconforming students were punished by suspensions and expulsions; their parents could be fined or jailed. Initially, in 1940, the Court upheld the flag salutes, with Justice Frankfurter concluding that the mandatory exercise promoted "national cohesion," which he said was "the basis of national security."[1046] Those complaining about the flag salute were Jehovah's Witnesses, who regarded the recitation as the worship of a "graven image" contrary to Biblical command.[1047] Exempting these few dissenters "might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise."[1048] Three years later, the Court repudiated its first flag salute decision; again on the complaint of Jehovah's Witnesses. Justice Jackson, who had joined the Court in the interim, wrote the opinion in *West Virginia Board of Education v. Barnette*.[1049] Justice Frankfurter, who had commanded a nearly unanimous Court during the first round, wrote the dissenting opinion.[1050]

Justice Jackson began his *Barnette* opinion by observing that the case was not following the pattern of the Court's previous First Amendment cases.[1051] In the usual speech case, the question is whether "the individual's right to speak his own mind" creates a clear and present risk of "grave and immediate danger."[1052] Here the state produced no evidence that a clear and present danger was presented by students "remaining passive during a flag salute ritual."[1053] Instead, West Virginia forced students to affirm "a belief and an attitude of mind."[1054] Such compulsion was futile, as history had repeatedly demonstrated, Justice Jackson asserted.[1055] "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[1056] This was a debatable proposition. At least in the short term (which can last lifetimes), plenty of societies in the past century have nurtured nationalistic fervor through inculcating devotion to symbols and

1046. *Id.* at 595.
1047. *Id.* at 592.
1048. *Id.* at 600.
1049. 319 U.S. 624 (1943).
1050. *Id.* at 646.
1051. *See id.* at 630.
1052. *Id.* at 634, 639.
1053. *Id.* at 633–34.
1054. *Id.* at 633.
1055. *Id.* at 641.
1056. *Id.*

flags, as well as reverence for specific leaders. The utility of the salute to inculcating patriotism, however, was not Justice Jackson's main point; which was to disallow entirely the idea of government-mandated affirmations of belief. In one of the most memorable lines in the Court's history, and certainly among Justice Jackson's best (which is saying something), he challenged the premise that government may prescribe what people must believe:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[1057]

Volumes are packed into these two sentences. At once, he repudiated the political systems that dominated the world for millennia while distinguishing the American commitment to individualism from totalitarian systems left and right. Americans were entitled to denounce their nation, so long as they obeyed its laws in acting. At bottom, this was a statement that went beyond freedom of speech to the core assumption of individuality that underlies the Constitution. The principles of the Bill of Rights, Justice Jackson stated, "grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs."[1058] Translating that concept of rights to a modern world of extensive government controls over the people was a daunting task for the Court, Justice Jackson agreed; even so, he reverted to the individual as the irreducible and uncontestable source of opinion on everything great and small.[1059]

IV. THE SECOND RED SCARE: FREE EXPRESSION IN THE COLD WAR

With the onset of the Cold War after World War II, federal and state governments took a series of steps to contain domestic Communism, often curtailing the speech rights of leftists in the

1057. *Id.* at 642.
1058. *Id.* at 639–40.
1059. *Id.* at 639.

process. In reality, as legal historian William Wiecek recounts, "[t]he first and second Red Scares were not discrete, disconnected events. Rather, they were phases on a continuum."[1060] Congress, state governments and anti-communist private and civic organizations remained active throughout this period.[1061] In 1938, the Hatch Act barred from federal employment those who belonged to "any political party or organization which advocates the overthrow of our constitutional form of government in the United States."[1062] Appropriations bills routinely contained clauses denying funding to anyone advocating the violent overthrow of the government or who belonged to a group that did.[1063] With the signing of the German-Soviet Nonaggression Pact in 1939, which lasted until Hitler's invasion of the Soviet Union in 1941, official scrutiny of American Communism once again intensified.[1064] Congressional investigations of Communists, which had been going on for years, swelled in the late 1930s, eventually becoming the bailiwick of the House Committee on Un-American Activities (HUAC).[1065] FBI investigations of the party under director J. Edgar Hoover multiplied as dossiers on thousands of suspected Communists were compiled.[1066] Nevertheless, American Communism arguably reached its zenith during the 1930s, as the party generally supported President Roosevelt's policies while the Depression offered the dismal economic conditions that made radical solutions attractive to many. By some estimates, the party had around 100,000 members by that decade's end and it was actively participating in electoral politics.[1067] In 1936, the party's candidate for President, Earl Browder, appeared on the ballot in thirty-five states and received over 80,000 votes.[1068]

1060. Wiecek, *supra* note 496, at 406.
1061. *See id.*
1062. Act to Prevent Pernicious Political Activities, 76th Cong., 1st Sess. ch. 410, § 9A, 53 Stat. 1147 (1939).
1063. Wiecek, *supra* note 496, at 401.
1064. *See* Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 7 (1991); *see also* JOSEPH R. STAROBIN, AMERICAN COMMUNISM IN CRISIS, 1943-1957 23–24 (1972).
1065. Rohr, *supra* note 1064, at 7.
1066. *Id.* at 7.
1067. *Id.* at 6.
1068. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 159 (1937). *But see*, Wiecek, *supra* note 496, at 392–429 (discussing legislative and investigative efforts against Communists during the late 1930s and 1940s).

Congress passed the Smith Act in 1940, making it illegal to "willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government."[1069] Justice John Marshall Harlan later explained that the law's "prototype was the New York Criminal Anarchy Act."[1070] States likewise passed sedition acts and brought their own prosecutions. Another law enacted by Congress in 1940 required that organizations planning to overthrow the government first register with the government, an unlikely scenario—but failing to register carried serious criminal penalties.[1071] To rid unions of Communists (in which the party had made substantial gains), a section of the Taft-Hartley Act of 1947 obliged union officials to declare each year that they were not members of the party.[1072] Refusal to sign cost the official's union the benefits of the National Labor Relations Act. Sustaining this provision in a 1950 case, Chief Justice Vinson emphasized the Communist Party's use of strikes for political purposes: "Congress might reasonably find . . . that Communists, unlike members of other political parties . . . represent a continuing danger of disruptive political strikes when they hold positions of union leadership."[1073] By executive order in 1947, President Truman purged "disloyal persons" from the federal employment, which expressly included Communists, and required loyalty investigations of applicants and employees.[1074]

Under the far-reaching Internal Security Act of 1950 (McCarran Act), a Subversive Activities Control Board was created to investigate Communist organizations and require them to register with the federal government.[1075] Membership in a Communist group led to a loss of numerous privileges, including federal employment, work in defense industries, and a U.S. passport.[1076] Communist organizations, whether registered

1069. Alien Registration Act, ch. 439, §§ 2–3, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (2000)).
1070. Yates v. United States, 354 U.S. 298, 309 (1957).
1071. Voorhis Act, ch. 897, §§ 1–4, 54 Stat. 1201–04 (1940) (current version at 18 U.S.C. § 2386 (2000)).
1072. Taft-Hartley Act, ch. 120, § 9, 61 Stat. 136 (1947).
1073. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 393 (1950).
1074. Exec. Order No. 9,835, 3 C.F.R. 129 (2008).
1075. Internal Security Act of 1950, ch. 1024, § 7, 64 Stat. 987 (1950).
1076. *See* Rohr, *supra* note 1064, at 24–26.

voluntarily or involuntarily, were to divulge their finances, funding sources, location of printing presses, and membership lists; they were ineligible for tax-exempt status and their mailings had to contain a notice that it came from a "Communist organization."[1077] The Attorney General was directed to keep a public list of Communist groups and their members.[1078] Another provision of the McCarran Act made it "unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship."[1079] Title II of the act, known as the Emergency Detention Act of 1950,[1080] allowed the Attorney General during time of invasion, war or insurrection to detain any person who "probably" would engage in espionage or sabotage for the duration of the emergency.[1081] An FBI Security Index of persons to be arrested in the event of national emergency included 26,000 names in 1955.[1082] Congress actually appropriated money in 1952 for six detention camps, including re-opening the former Japanese-American internment camp at Tule Lake, California.[1083] As in the first Red Scare, immigration laws were a primary instrument for ridding the country of radicals. Under the McCarran Act, Communist aliens could be excluded, denied naturalization, and deported.[1084]

Finally, in the Communist Control Act of 1954, Congress vowed that "the Communist Party should be outlawed";[1085] formally declaring that Communists were not a legitimate political party. They functioned in secrecy, and what was most damning, "the policies and programs of the Communists Party are secretly prescribed for it by the foreign leaders of the world Communist

1077. *Id.* at 22–24.
1078. Internal Security Act of 1950, ch. 1024, §§ 6–11, 64 Stat. 991 (1950).
1079. *Id.* § 4a.
1080. Emergency Detention Act of 1950, Pub. L. No. 831, Tit. II, § 101(6), 64 Stat. 1019–20 (1950).
1081. *Id.* § 103 (a).
1082. *See* Alien Registration Act, ch. 439, § 9, 54 Stat. 670 (1940) (describing Attorney General's list); GOLDSTEIN, *supra* note 671, at 323–24 (describing the FBI Security Index and plans for detention centers); Rohr, *supra* note 1064, at 14–15 (describing anti-communist immigration laws).
1083. Wiecek, *supra* note 496, at 427.
1084. *See* Rohr, *supra* note 1064, at 14–15.
1085. Communist Control Act of 1954, Pub. L. No. 637, ch. 886, § 2, 68 Stat. 775 (1954).

movement."[1086] Technically, the party was not illegal, but it would receive none of the "the rights, privileges, and immunities" of other "legal bodies."[1087] Apparently this was intended in part to deny the party a place on the ballot, which followed the lead of many states that already had excluded the party from elections. Congress' actions went well beyond this purpose; the party became a stranger to the laws—it was literally "outlawed."[1088]

Communist and Socialist speakers at public events often provoked confrontations of the sort that the Court had been dealt with in *Cantwell v. Connecticut*[1089] and *Terminiello v. Chicago*.[1090] Only now, the Justices' enthusiasm for protecting unpopular street orators waned. Irving Feiner, a college student and member of the Young Progressives of America, was giving a soapbox speech with an amplifier at a street corner in a racially mixed section of Syracuse, New York.[1091] It was early evening in 1949, and about seventy-five people gathered to hear him as he encouraged listeners to attend a speech on the subject of civil rights that night by a prominent lawyer.[1092] Feiner harshly criticized the mayor's earlier denial of a permit for a speech by the same lawyer.[1093] Referring to the mayor as "a champagne-sipping bum," Feiner asserted that the official did "not speak for the negro people."[1094] President Truman also received the appellation "bum," and Feiner castigated the American Legion as "a Nazi Gestapo."[1095] Possibly it was Feiner's "loud, high-pitched voice" that annoyed the crowd, but in any event he "stirred up a little excitement," as there were "angry mutterings, pushing, shoving and milling around and restlessness."[1096] Or perhaps it was Feiner's message, in which he asserted that African-Americans "don't have equal rights and they should rise up in arms and fight for them."[1097] At that point, one man informed a police

1086. *Id.*
1087. *Id.* § 3, at 776.
1088. Rohr, *supra* note 1064, at 15.
1089. 310 U.S. 296 (1940)
1090. 337 U.S. 1 (1949).
1091. Feiner v. New York, 340 U.S. 315, 316 (1951).
1092. *Id.* at 317.
1093. *Id.*
1094. *Id.* at 330 (Douglas, J., dissenting).
1095. *Id.*
1096. *Id.* at 317.
1097. *Id.* at 324 (Black, J., dissenting).

officer on the scene that "if they did not take that 'S. . .O. . .B. . .' off the box, he would."[1098]

After three requests from the police to desist speaking, Feiner was arrested and eventually convicted of disorderly conduct (he was also expelled from Syracuse University because of the incident).[1099] Chief Justice Vinson's 6–3 decision affirming the conviction purported to examine the evidence from the trial closely. As Vinson saw it, Feiner was not found guilty for *what* he had said—"it was the reaction which it actually engendered" that landed him in the slammer for thirty days.[1100] Vinson then recited *Cantwell*'s line that coercive state power would prevail over free speech claims if there were "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order."[1101] Feiner, the majority thought, had exceeded "the bounds of argument or persuasion and undertake[n] incitement to riot."[1102] The young man's "deliberate defiance of the police officers" only made matters worse.[1103] Moreover, deference had to be given to "the considered judgment of three New York courts approving the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order."[1104]

Feiner raised one of the most basic questions in First Amendment law: Given a potentially violent conflict between a speaker and an audience, should the police protect the speaker from the crowd or arrest the speaker? Justice Black, whose views were shared by Justices Douglas and Minton, urged in dissent that the police had a duty to guard Feiner's "right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak."[1105] Opponents of a speaker need only raise a ruckus, and "as a practical matter, minority speakers can be silenced in any city."[1106]

1098. *Id.*
1099. *Id.* at 316.
1100. *Id.* at 320.
1101. *Id.*
1102. *Id.* at 321.
1103. *Id.*
1104. *Id.*
1105. *Id.* at 327 (Black, J., dissenting).
1106. *Id.* at 328.

How could the Court reconcile its holding with *Terminiello* and *Cantwell*? Hadn't the former proclaimed that free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[1107] In *Cantwell*, immediately after the "clear and present danger" quotation used in *Feiner*, the Court had added: "Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."[1108]

What about the pushing and shoving in Feiner's audience? Justice Black pointed out that "[i]t is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker."[1109] Cantwell's listeners had been "highly offended" as well, and physical threats were made against him.[1110] When Justice Roberts reviewed the precedents in his *Cantwell* opinion, he concluded that "the provocative language which [has been] held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks *directed to the person of the hearer*."[1111] That was not true of Irving Feiner's remarks. Did Feiner have a "truculent bearing," or show "intentional discourtesy," which *Cantwell* mentioned as factors?[1112] Without a tape recording, it is impossible to know for sure what happened, but should a speaker's truculence be the measure? Since there has never been a truculence-meter on the market, the outcomes of cases under the *Feiner* approach will vary according to the sensibilities of the judge or jury. Regardless of whether the results are more or less consistent among the cases, why shouldn't the First Amendment protect a speech that is "ferocious," "scathingly harsh," or "belligerent"—all meanings of "truculent"?

State governments also took active efforts to remove Communists from public employment, especially in education. Affirming that the states could do so, *Adler v. Board of Education* in 1952 allowed New York to discharge teachers who advocated the forcible overthrow of the government or belonged to an

1107. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).
1108. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).
1109. *Feiner*, 340 U.S. at 325–26 (Black, J., dissenting).
1110. *Cantwell*, 310 U.S. at 309.
1111. *Id.* (emphasis added).
1112. *Id.* at 310.

organization that the state found to have such a goal.[1113] Earlier cases from 1951 had determined that government employees and candidates for government office could be required to swear that they did not advocate violent overthrow of the government and that they had not been involved with subversive organizations.[1114] In the case of the employee, the Court at least implied that the outcome would have been different if the city involved used the oath to the detriment of an employee who had joined a subversive group "innocent of its purpose," or who had severed ties with the organization.[1115] But in *Adler*, less than a year later, Justice Minton's majority opinion took a page from Holmes in positing that "[i]f they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[1116] Regarding the teachers' complaint that they might not know of the organization's illegal purposes or support them, Minton replied curtly that the state could reasonably infer from membership that the person supported its ends.[1117] "From time immemorial, one's reputation has been determined in part by the company he keeps,"[1118] Minton wrote, to which Justice Douglas replied in dissent that this assumption was rooted in "a principle repugnant to our society—guilt by association."[1119]

In *Wieman v. Updegraff*,[1120] the Court retreated somewhat from its stiff posture in *Adler* and struck down a loyalty oath demanded of all Oklahoma public employees. Oklahoma's oath covered all the bases—employees had to swear to a laundry list of assertions, such as that they would "bear true faith and allegiance to the Constitution;"[1121] that for the last five years they had not been members of any kind of Communist association or a member of

1113. Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952).
1114. Garner v. Bd. of Pub. Works, 341 U.S. 716, 716 (1951) (holding that a city could require its employees by affidavit to disclose their past or present membership in the Communist Party or Communist Political Association); Gerende v. Bd. of Supervisors of Elections, 341 U.S. 56, 56–57 (1951) (per curiam) ("A candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by force or violence,' and that he is not knowingly a member of an organization engaged in such an attempt.").
1115. *Garner*, 341 U.S. at 723.
1116. *Alder*, 342 U.S. at 492.
1117. *Id.* at 495.
1118. *Id.* at 493.
1119. *Id.* at 508 (Douglas, J., dissenting).
1120. 344 U.S. 183 (1952).
1121. *Id.* at 185 n.1.

any group on the Attorney General's list of subversive organizations, or a group advocating violent overthrow of the government; that the person would not "advocate revolution," or violence, sedition or treason, against the Government; and that the employee would not become a member of such a group.[1122] Justice Clark's opinion displayed unusual sensitivity—for that era—toward the public employees impacted by these laws: "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy."[1123] Membership could have been "innocent" or the employee may have been "unaware of its activities and purposes."[1124] *Adler* was distinguished by Clark on a wholly specious ground. Supposedly, he claimed, *Adler* placed great emphasis on the assertion that "the New York courts had construed the statute to require knowledge of organizational purpose before the regulation could apply."[1125] *Adler* had held no such thing, and in fact it said just the opposite—that the legislature *could* infer support of the organization's ends from membership alone.[1126] Be that as it may, after *Wieman,* mere membership in a subversive group could not be the basis for losing one's job.

Another interesting feature of *Wieman* was its departure from *Adler*'s assumption that employees could be forced to abide by the loyalty program as a condition of their employment. Justice Clark insisted that *Adler* had been misunderstood. To posit from the employee's lack of a right to a job that any form of loyalty oath could be required tended to "obscure the issue."[1127] Since *Adler* had been quite clear on this point, Clark may have meant that Minton's opinion had not thought through all of the ramifications of its reasoning. Obviously, there were conditions that government could not place on employment: "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'"[1128] Having

1122. *Id.*
1123. *Id.* at 190–91.
1124. *Id.* at 190.
1125. *Id.* at 189.
1126. *See* Adler v. Bd. of Educ., 342 U.S. 485, 494–95 (1952).
1127. *Wieman*, 344 U.S. at 191.
1128. *Id.* at 191–92, (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947)).

highlighted this interesting issue, Clark quickly added that the Court was not considering "whether an abstract right to public employment exists."[1129] Yet he enunciated an important right for government employees: a "public servant" could not be excluded from employment by a law that was "patently arbitrary or discriminatory."[1130] This constituted a critical development: it repudiated the old Holmesian dictate that public employees took their jobs on whatever conditions were imposed by the state.[1131] By 1956, Justice Clark wrote for the Court that "[t]o state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."[1132] Nevertheless, the bottom line of the early public employee loyalty cases remained: public employees could be forced out of their jobs for past or current Communist associations, provided they knew the purpose of the organization. Knowing membership in any such group or engaging in subversive advocacy were proper grounds for refusal of employment of dismissal. Loyalty oaths or questioning of employees could be used to search for evidence of rebellious attitudes.

To demand a loyalty oath of someone, the government needed to show a legitimate purpose. When public employees were involved, "[t]he principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public."[1133] Absent that justification, there would be no basis for extracting an oath. Justice Brennan established this principle in a 1958 decision, *Speiser v. Randall*.[1134] California had created a property tax exemption for veterans, provided that they signed an oath swearing that they did not advocate the overthrow of the government by force.[1135] Characterizing the denial of an exemption as a penalty, "the same as if the State were to fine them for this

1129. *Id.* at 191.
1130. *Id.* at 192.
1131. *See, e.g.*, McAuliffe v. City of New Bedford, 29 N.E. 517, 518 (1892) (Holmes stating that city could impose conditions on holding office as long as reasonable).
1132. Slochower v. Bd. of Higher Educ., 350 U.S. 551, 555 (1956).
1133. Speiser v. Randall, 357 U.S. 513, 527 (1958).
1134. *Id.* at 513.
1135. *Id.* at 517.

speech,"[1136] Brennan contrasted California's requirement with employee loyalty oaths, which served the legitimate purpose of avoiding misuse of the position "to the detriment of the public."[1137] California had no such justification, and appeared to be basing tax liability simply on "the expression of political ideas."[1138] Compounding the deterrent to expression, the actual determination of the veteran's loyalty was not conclusively established by the oath: "it is clear that the declaration may be accepted or rejected on the basis of incompetent information or no information at all."[1139] Placing the burden of proof on the taxpayer "violated the requirements of due process," and the "short-cut procedure" of requiring an oath "must inevitably result in suppressing protected speech."[1140] California maintained that the tax exemption would only be denied to those engaging in criminal advocacy. Without disputing that California could so limit its exemptions, Brennan held that due process required that the state bear the burden of proof on the criminality of a taxpayer's speech.[1141]

Most of this elaborate anti-Communist apparatus had only a relatively minor effect on the party, even if it did ruin thousands of careers of loyal Americans in its course. True-blue Communists usually had no scruples against signing loyalty oaths, which left the requirement mainly as a noose for conscientious civil libertarians and a deterrent to becoming involved in progressive causes. But the Smith Act ("the Act") was another story, as it had devastating consequences for the U.S. Communist Party and like groups.[1142] Only a few prosecutions under the Act had taken place during World War II.[1143] However, the beginning of the Cold War brought a renewed focus on Communist activities, with politicians of all stripes tripping over each other to avoid being tarred as "soft on Communism." From the perspective of more than a half century later, much of this fervor seems opportunistic and at times

1136. *Id.* at 518.
1137. *Id.* at 527.
1138. *Id.*
1139. *Id.* at 528.
1140. *Id.* at 529.
1141. *Id.* at 528–29.
1142. *See* MICHAEL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES 190 (1977).
1143. *See* GOLDSTEIN, *supra* note 671, at 268–71. *See, e.g.*, Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943) (Smith Act prosecution against members of Minnesota Socialist Workers Party).

paranoid. Nevertheless, considering the actions of the Soviet Union in rapidly transforming Eastern Europe into client states, along with that country's own confrontational rhetoric, the alarm was at least understandable. By 1948, the U.S. Communist Party boasted of having 60,000 members; it ran candidates in elections, published newspapers, and was thoroughly infused into many labor unions.[1144] On the other hand, it had lost tens of thousands of members since the war began.[1145] A decade later, with its national leaders convicted and the organization thoroughly infiltrated by the FBI, coupled with the Soviet Union's own revelations of Stalinist abuses, and sobered by the Soviet rout of the Hungarian revolt in 1956, American leftists abandoned the party in droves.[1146]

During 1948, Smith Act indictments were lodged against the upper echelon of the U.S. Communist Party's leadership in *United States v. Dennis* (Eugene Dennis was the General Secretary of the party).[1147] They were charged with conspiring to advocate the overthrow of the government by force through the formation of the Communist Party. Note carefully the wording of that charge. None of the defendants was accused of actually *acting* to overthrow the government—their crime was conspiring to *advocate* that course of action at some indefinite point in the future.[1148] Trial in the case consumed nine months and produced a 16,000-page transcript.[1149] According to the court of appeals, "[t]he record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition."[1150] By one informed account of the trial, "the prosecution relied mainly on articles, pamphlets, and books—especially on Marx and Engels' The Communist Manifesto (1848), Lenin's State and Revolution (1917), Stalin's Fundamentals of Leninism (1929) and Program of the Communist International (1928)."[1151] What account of the trial is he referring to? Not in the Court of Appeals or in the USSC cases. The bulk of this evidence was "quite dated, and the government could offer no proof that American Communists were about to translate into action any of

1144. *See* Rohr, *supra* note 1064, at 29; Wiecek, *supra* note 496, at 403.
1145. *Id.*
1146. *Id. See also* Starobin, *supra* note 1064, at 113–14.
1147. 341 U.S. 494 (1951).
1148. *Id.* at 544–45.
1149. *Id.* at 497.
1150. United States v. Dennis, 183 F.2d 201, 226 (2d Cir. 1950).
1151. BELKNAP, *supra* note 1142, at 82–83.

the ideas it contained. Nevertheless, literature was the heart of the prosecution's case."[1152] Instructing the jury, the district judge informed them that to be guilty the defendants must have engaged in "the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to . . . cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."[1153] Merely teaching the "abstract doctrine of overthrowing or destroying organized government by unlawful means" was lawful.[1154]

The eleven defendants tried in *Dennis* were convicted on October 14, 1949, "and all of them but one was sentenced to five years in prison and a $10,000 fine."[1155] As one observer noted, "1949 was surely not a year in which Americans were particularly inclined to take a benign view of domestic Communism."[1156] During 1949, the People's Republic of China was established, the Soviets exploded their first atomic weapon, NATO was formed to combat Soviet expansionism, and the perjury trial of Alger Hiss convinced many that Communists had infiltrated the highest levels of power in the United States.[1157] The following year was just as bleak. The Second Circuit Court of Appeals heard argument in the *Dennis* case one day before North Korea invaded South Korea, and only months after Senator Joseph P. McCarthy had announced that he possessed a list of over two hundred "known" communists "making policy" in the State Department (a list that never saw the light of day.)[1158] A little more than a month following oral argument in the court of appeals, and supposedly after an extensive study of the mammoth record, the convictions were upheld in an opinion by Judge Learned Hand.[1159] Hand himself believed the prosecutions were a political mistake, as he wrote to an

1152. *Id.* at 215.
1153. United States v. Dennis, 341 U.S. 494, 511–12 (1951) (Vinson, C.J., plurality opinion).
1154. *Id.* at 511.
1155. Rohr, *supra* note 1064, at 51.
1156. *Id.*
1157. *Id.*
1158. Joseph P. McCarthy, Address at Republican Women's Club of Ohio County, Wheeling, West Virginia (Feb. 9, 1950). *See also* THOMAS C. REEVES, THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY (1983); Francis Coker, *Book Review, McCarthy and His Enemies: The Record and its Meaning*, 17 J. POLITICS 113, 115 (1955) (McCarthy had no such names and there never was a list).
1159. United States v. Dennis, 183 F.2d 201, 201 (2d Cir. 1950).

acquaintance afterwards: "Personally I should never have prosecuted those birds. . . . So far as all this will do anything, it will encourage the faithful and maybe help the [Party's] Committee on Propaganda."[1160] From his opinion, however, you would never know that he had reservations about the matter.

Judge Hand spent only a few paragraphs relating the facts to the Smith Act charges. Concerning the Communist Party, he found them a dangerous lot:

> The American Communist Party, of which the defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. . . . The jury has found that the conspirators will strike as soon as success seems possible, and obviously, no one in his senses would strike sooner.[1161]

Holding a "passionate Utopian faith" would put these defendants in the same company as Thoreau or even Woodrow Wilson. It was the advocacy of "violent capture of all existing governments," and their willingness to strike when the time was opportune that distinguished Communists from philosophers and dreamers. Referring to world events such as the Berlin blockade of 1948-49 and the increasing political power of Communists in Western Europe, Hand thought the "probable danger" could not have been more acute: "Any border fray, any diplomatic incident, any difference in construction of the modus vivendi—such as the Berlin blockade we have just mentioned—might prove a spark in the tinder-box, and lead to war."[1162]

Five months after the Second Circuit handed down its decision in *Dennis*, the Supreme Court heard oral argument in the case. Before the decision was announced, Ethel and Julius Rosenberg were convicted and sentenced to death for passing atomic secrets

1160. Learned Hand to Felix Frankfurter (June 8, 1951), *quoted in* GERALD GUNTHER, LEARNED HAND 603 (1994).
1161. *Dennis*, 183 F.2d at 212–13.
1162. *Id.* at 213.

to the Soviet Union.[1163] The Rosenbergs were executed on June 19, 1953.[1164] When the Court accepted *Dennis* for review, it expressly refused to examine the sufficiency of the evidence, which meant the Justices would not question the finding that the defendants "did in fact advocate the overthrow of the Government by force and violence."[1165] All that the Court would do was review the constitutionality of the Smith Act and whether the jury had been properly instructed. When the Court announced its decision upholding the convictions in June 1951, no opinion commanded a majority, and their differences revealed deep rifts among the Justices on applying the First Amendment. Nevertheless, six members of the Court held that Smith Act was not an unconstitutional form of sedition law.[1166]

Chief Justice Vinson spoke for the largest bloc, which included Justices Reed, Burton, and Minton.[1167] Vinson started by describing the Communist Party with language similar to Hand's, affirming that "the general goal of the Party, was, during the period in question, to achieve a successful overthrow of the existing order by force and violence."[1168] The government surely could act to prevent this eventuality: "Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change."[1169] The plurality agreed that the prosecution must pass the clear and present danger test, conceding that "[a]lthough no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale."[1170] Here, Vinson meant that "even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing that there was no danger that the substantive evil would be brought about."[1171] Qualifying

1163. Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg*, 86 YALE L.J. 1622, 1624–25 (1977).
1164. *Id.*
1165. Dennis v. United States, 341 U.S. 494, 497 (1951) (Vinson, C.J., plurality opinion).
1166. *Id.* at 516.
1167. *Id.*
1168. *Id.* at 498.
1169. *Id.* at 501.
1170. *Id.* at 507.
1171. *Id.*

that statement, Vinson added that clear and present danger did not "mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited."[1172] A doomed-from-the-start revolution could still cause much injury.[1173]

Learned Hand's opinion for the court of appeals had convinced Vinson to endorse his controversial definition of clear and present danger: "'In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[1174] Vinson gave no reason for "adopt[ing] this statement of the rule."[1175] Hand's own explanation of this formula had been brief and unsupported by precedent. He wrote that "We have purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation."[1176] Hand explained, "Given the same probability, it would be wholly irrational to condone future evils which we should prevent if they were immediate."[1177] To accept such a construction would require the court to accept "indifference to those who come after us. It is only because a substantial intervening period between the utterance and its realization may check its effect and change its importance, that its immediacy is important."[1178] Hand—and Vinson—had ignored the Court's then-current interpretation of clear and present danger, which was that there must be both a "grave *and* immediate danger" to justify suppressing speech.[1179] Under Hand's formula, an extremely serious evil—such as the fall of the national government to rebellion—would justify suppression of speech that only remotely threatens that result. Vinson remarked that "this is the ultimate

1172. *Id.* at 509.

1173. *Id.* "Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." *Id.*

1174. *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

1175. *Id.* "[I]t is as succinct and inclusive as any other we might devise at this time." *Id.*

1176. *Dennis*, 183 F.2d at 212.

1177. *Id.*

1178. *Id.*

1179. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("But freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.").

value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."[1180]

Vinson was following Holmes and Brandeis, as well as recent precedent, in explaining the immediacy requirement as a commitment to allowing counter-speech to defuse the harm. But once the harm was found to be grave and immediate, talk of probabilities became too abstract to be practical, and outside the ken of most judges anyway. Frankfurter wrote in his own concurring opinion, possibly in response to Vinson: "To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment."[1181]

Much of Vinson's reasoning expressly depended on his understanding of world events. Confronting the United States at that time was a state of affairs far removed from "[t]he situation with which Justices Holmes and Brandeis were concerned in *Gitlow* [which] was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community."[1182] By comparison, the Communist Party represented by the *Dennis* defendants presented a real menace, as its leaders had constructed "an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis."[1183] This notion, that the Communist Party represented a fundamentally different threat to society than the early twentieth-century anarchists and socialists, was a theme picked up by the concurring opinions of Frankfurter and Jackson.[1184] They also agreed with Vinson that, as Frankfurter wrote, the Court must "take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendency in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country."[1185] Frankfurter went a step further, contending that it was Congress's role to notice and act on such

1180. *Dennis*, 341 U.S. at 509 (Vinson, C.J., plurality opinion).
1181. *Id.* at 551 (Frankfurter, J., concurring).
1182. *Id.* at 510.
1183. *Id.*
1184. *See* text accompanying notes 1185, 1187–1201.
1185. *Id.* at 547 (Frankfurter, J., concurring).

events, even though the Smith Act was already eleven years old, and much had happened in the interim.[1186]

Justice Frankfurter's concurring opinion was driven by his fixation with judicial restraint and deference to the political processes. Rejecting reliance on "dogmas too inflexible for the non-Euclidian problems to be solved,"[1187] Frankfurter called for a "candid and informed weighing of the competing interests"[1188] of national security and free expression. Such balancing was "the business of legislatures," not the judiciary.[1189]

> It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends.[1190]

Only if the legislative conclusion were "outside the pale of fair judgment," would the Court be justified in intervening, Frankfurter concluded.[1191] Frankfurter candidly acknowledged that it was "self-delusion" to think that civil liberties would not be short-changed in the process.[1192] Nabbing Communists inevitably risked incriminating "loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas."[1193] Undoubtedly, legislatures would overreach, he admitted. Considering the danger posed by the Communist Party, however, it was a risk worth taking for Frankfurter: "The defendants have been convicted of conspiring to organize a party of persons who advocate the overthrow of the Government by force and violence. . . . On any

1186. *Id.*
1187. *Id.* at 525.
1188. *Id.*
1189. *Id.* at 540.
1190. *Id.* at 550–51.
1191. *Id.* at 540.
1192. *Id.* at 549.
1193. *Id.*

scale of values which we have hitherto recognized, speech of this sort ranks low."[1194]

Justice Jackson's concurrence entirely rejected the use of the clear and present approach to the activities of the Communist Party, which "realistically is a state within a state, an authoritarian dictatorship within a republic."[1195] Communists had "no scruples against sabotage, terrorism, assassination, or mob disorder."[1196] He would have reserved the clear and present danger standard for situations in which the judicial process had the competence "to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam."[1197] Implicitly agreeing with Frankfurter that the Communist movement called for the primacy of legislative judgment, he chided his colleagues who "seem to me to discuss anything under the sun except the law of conspiracy."[1198] Congress "is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose."[1199] Unquestionably, the Communist Party was "a well-organized, nation-wide conspiracy" devoted to an illegal ambition.[1200] As a conspiracy, it could be punished without proof of any overt steps toward violence. "The basic rationale of the law of conspiracy," he emphasized, was "that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish."[1201]

Justices Black and Douglas dissented in *Dennis*. (Justice Clark, who had been Attorney General during the prosecutions, did not participate in the case.) Black emphasized that the defendants had not attempted to overthrow the government, nor had they been charged with "saying anything or writing anything designed to overthrow the Government."[1202] All they had done, it seems, was agree "to assemble and to talk and publish certain ideas at a later date."[1203] Black refused to accept Congress' judgment without

1194. *Id.* at 544–45.
1195. *Id.* at 577 (Jackson, J., concurring).
1196. *Id.* at 564.
1197. *Id.* at 568.
1198. *Id.* at 572.
1199. *Id.* at 575.
1200. *Id.* at 568.
1201. *Id.* at 573.
1202. *Id.* at 579 (Black, J., dissenting).
1203. *Id.*

independent proof produced by the government at trial. He stated that deferring to the legislature "waters down the First Amendment so that it amounts to little more than an admonition to Congress."[1204] Douglas took a similar line—that there was no evidence of actions in preparation for revolution, such as "teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like."[1205] Their actions amounted to organizing people "to teach and themselves teach the Marxist-Leninist doctrine," using the classic texts of Marx, Engels, Lenin, and Stalin.[1206] This was pure speech, and as such it could only be punished upon a showing of a clear and present danger, which at the very least meant that "[t]here must be some immediate injury to society that is likely if speech is allowed."[1207]

The three sets of Justices—the Vinson plurality, the Frankfurter and Jackson concurrences, and the Black and Douglas dissents—disagreed on fundamental premises. Nevertheless, a majority of the Court concurred that mere advocacy of insurrection could be punished, regardless of its remoteness. For the dissenters, the American experience with Communism proved that the marketplace of ideas worked. Douglas was most insistent on this point: "Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party."[1208] In America, Communists were "miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful."[1209]

Although the fractured Court in *Dennis* thoroughly confused the Court's theoretical basis for upholding seditious speech convictions, the outcome at least signaled to the government that the Smith Act was constitutional. Since a successful prosecution apparently could be obtained by proof of teaching and advocating the Marxist canon, there were hundreds, if not thousands, of potential targets.[1210] Across the country, the government began Smith Act proceedings against more than a hundred of the

1204. *Id.* at 580.
1205. *Id.* at 581 (Douglas, J., dissenting).
1206. *Id.* at 582.
1207. *Id.* at 585.
1208. *Id.* at 588.
1209. *Id.* at 589.
1210. *See* Rohr, *supra* note 1064, at 19–20 (discussing post-*Dennis* prosecutions).

Communist Party's second tier of leadership. Most were found guilty. But then the Court reviewed and reversed the convictions of fourteen party officials in the 1957 case, *Yates v. United States*.[1211] Following a four-month trial, the defendants had been convicted of violating the Smith Act and sentenced to five years in the penitentiary on top of $10,000 fines.[1212] Unlike *Dennis*, the Court parsed the 14,000-page record to determine if the evidence was adequate to support the convictions.[1213]

Justice Harlan, who had replaced Jackson on the Court in 1955, wrote the majority opinion in *Yates*. Technically, his opinion only clarified the statutory requirements of the Smith Act. Harlan's interpretation assumed, nonetheless, that Congress did not intend to "disregard a constitutional danger zone so clearly marked," implying that the Court's ruling marked the boundaries of what legislation could accomplish consistent with the First Amendment.[1214] The heart of the *Yates* decision was a revisionist restatement of *Dennis*' constitutional holding:

> The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.[1215]

Advocacy proscribed by the Act did not consist "of preaching abstractly the forcible overthrow of the Government."[1216] Rather, "The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something."[1217] Mere membership in the party or even being an officer of the organization did not prove the requisite intent to overthrow. After reviewing the

1211. 354 U.S. 298 (1957), *overruled by* Burks v. United States 437 U.S. 1 (1978) (adopting a new double-jeopardy rule).
1212. *Id.* at 302–03, 341.
1213. *Id.* at 327–28 n.34.
1214. *Id.* at 319.
1215. *Id.* at 321 (citation omitted).
1216. *Id.* at 324.
1217. *Id.* at 324–25.

evidence using this standard, the majority ordered immediate acquittals for five defendants and new trials for the rest.[1218]

Did *Yates* accurately report the "essence" of the holding in *Dennis*? Justice Clark, in his dissent in *Yates*, professed that "I have read this statement over and over but do not seem to grasp its meaning for I see no resemblance between it and what the respected Chief Justice wrote in *Dennis*, nor do I find any such theory in the concurring opinions."[1219] The command of the Harlan restatement of *Dennis*, to look for "language of incitement," resembled Learned Hand's brief-lived rule in *Masses Publishing Co. v. Patten*[1220] far more than it did anything written by those voting to uphold the convictions in *Dennis*. With Harlan's formulation, it is doubtful whether the *Dennis* defendants could have been convicted. Justice Black, in dissent, thought that there were no real differences between the two sets of accused Communists, as did Justice Tom C. Clark in his dissent. Both groups "served in the same army and were engaged in the same mission. The convictions here were based upon evidence closely paralleling that adduced in *Dennis* . . . ."[1221] Justice Clark thought that "[t]he conspiracy charged here is the same as in *Dennis*, except that here it is geared to California conditions . . . ."[1222]

After *Yates*, it was not a crime under the Smith Act to organize or teach classes on the superiority of communism or the imperative of revolution. To convict, there must be advocacy of action within the context of an organization sufficiently capable of accomplishing violence. Whether this distinction is meaningful and workable has been doubted. Martin Redish has argued that "attempting to distinguish between one who favors the ultimate overthrow of the government in the 'abstract' and one who illegally advocates overthrow at some undetermined future time rivals the inquiry into the number of angels dancing on a pin's head for absurdity."[1223] It may have been absurd, but the government regarded the new formulation as a decisive blow against use of the Smith Act to curb advocacy of communism. Charges were

1218. *Id.* at 331.
1219. *Id.* at 350 (Clark, J., dissenting).
1220. 244 F. 535 (S.D.N.Y. 1917), *rev'd*, Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917).
1221. *Yates*, 354 U.S. at 345 (Clark, J., dissenting).
1222. *Id.* at 344.
1223. Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1196 (1982).

dismissed against all of the defendants remaining in *Yates*. Judge Richard H. Chambers, who had been on the Ninth Circuit panel that approved the original convictions, commented as such afterwards: "One may as well recognize that the *Yates* decision leaves the Smith Act, as to any further prosecution under it, a virtual shambles . . . ."[1224]

The era of Smith Act prosecutions had come to an end as far as the Communist Party was concerned. Nevertheless, *Yates*, despite tempering *Dennis*, was a good deal less protective of speech than the First Amendment doctrines articulated by the Court in the 1940s. In addition to the point made by Professor Redish, the other striking aspect of *Yates* was its apparent abandonment of the need to prove an immediate danger from the defendants' speech activities. With Harlan's test, a conviction could be sustained for "indoctrination of a group in preparation for future violent action," in addition to "exhortation to immediate action."[1225] No time limit was placed on how far in the future the action needed to be. For that matter, "indoctrination" was defined no more specifically than urging someone "to do something, now or in the future."[1226] *Yates* did emphasize a point that the World War I and Red Scare cases had neglected: the organization in question must be "of sufficient size and cohesiveness," as well as "sufficiently oriented towards action" to make it reasonable to apprehend an attempt to overthrow the government.[1227] These were not the "puny anonymities" of *Abrams*. Because the government abandoned Smith Act prosecutions after *Yates*, it remains a mystery whether the rule Justice Harlan stated is valid only for large-scale conspiracies threatening the existence of the government. Two years later, Harlan wrote for the Court that it had "consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character."[1228] Outside the Communist Party cases, the Court's subsequent holdings on political speech usually have protected individuals who advocate violent solutions to political and social ills. Before turning to those decisions, the remainder of

1224. Fujimoto v. United States, 251 F.2d 342, 342 (9th Cir. 1958).
1225. *Yates*, 354 U.S. at 321.
1226. *Id.* at 325.
1227. *Id.* at 321.
1228. Barenblatt v. United States, 360 U.S. 109, 128 (1959).

the story regarding the government's attempt to suppress the Communist Party remains to be told.

The day *Yates* was decided, June 17, 1957, was quickly dubbed Red Monday by newspapers that were obsessed with the launch of the Soviet Sputnik satellite less than two weeks earlier.[1229] Three other cases decided that day were critical of governmental investigations into the loyalty of Americans, especially public employees.[1230] Chief Justice Earl Warren wrote for the Court in two of the cases involving legislative investigations, one by HUAC and the other a state inquiry. Chief Justice Warren used both occasions to denounce what he unmistakably thought had been excessive zeal in pursuing Communists and their sympathizers through open-ended legislative investigation.

One of these cases, *Sweezy v. New Hampshire*,[1231] arose after the legislature empowered the state Attorney General to act as a one-person investigation committee charged with determining if there were "subversive persons . . . presently located within this state."[1232] Paul Sweezy, a college professor at the University of New Hampshire, was the subject of one of these probes, during which the Attorney General asked him detailed questions about "his career and personal life."[1233] Sweezy answered most of the questions, candidly stating that he was a "classical Marxist" and a "socialist," though he denied ever having been a member of the Communist Party or that he believed in violent revolution.[1234] Sweezy declined to answer questions about the contents of his university lectures and what he knew about the New Hampshire Progressive Party or its members.[1235] In reversing Sweezy's conviction for his refusal to cooperate, Chief Justice Warren's plurality opinion openly assailed the damage that a government investigation could do to a person's life and career. The Chief

1229. ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 1 (1999). "Then came June 17, 1957, a day he [J. Edgar Hoover] called 'Red Monday'—not because of the red-hot weather, but because, as he saw it, that day the United States Supreme Court handed down four decisions favoring the 'Reds.'" *Id.*

1230. *See* Int'l Bros. of Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957).

1231. 354 U.S. 234 (1957).

1232. *Id.* at 236–37.

1233. *Id.* at 257 (Frankfurter, J., concurring).

1234. *Id.* at 238, 243.

1235. *Id.* at 241, 243–44, 248.

Justice was especially adamant that the state legislature had not justified its use of the Attorney General as a roving commission "in effect to screen the citizenry of New Hampshire" for disloyalty.[1236] "Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations in [sic] a measure of governmental interference in these matters."[1237] Besides, regardless of the outcome, the "stain of the stamp of disloyalty" is "deep," veritably "a badge of infamy."[1238] Sweezy had constitutional rights, Chief Justice Warren reminded New Hampshire: "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[1239] No prior opinion, except for a dissent by Justice Douglas,[1240] had recognized academic freedom as an independent constitutional value. In a sweeping rebuke of the state, the Chief Justice concluded in what amounted to an advisory opinion that "[w]e do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields."[1241]

Justice Frankfurter's concurring opinion, joined by Justice Harlan, ultimately reached the same conclusion as Chief Justice Warren. But Justice Frankfurter emphasized the need for a deliberate balancing of the respective interests of the individual and the state. At the same time, the former Harvard Law School professor let loose a tirade about academic freedom:

> When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence.[1242]

1236. *Id.* at 253.
1237. *Id.* at 250.
1238. *Id.* at 248.
1239. *Id.* at 250.
1240. *See* Adler v. Bd. of Ed. of New York, 342 U.S. 485, 508–11 (1952) (Douglas, J., dissenting), *abrogated by* Keyishian v. Bd. of Regents of Univ. of New York, 385 U.S. 589, 593–95 (1967).
1241. *Sweezy*, 354 U.S. at 251.
1242. *Id.* at 261 (Frankfurter, J., concurring).

Was this the same Frankfurter who in *Dennis* urged the Court to give outright deference to legislative judgments?[1243] In *Sweezy*, after conceding that the Attorney General was acting in the name of the legislature, Frankfurter concluded that the balance between personal liberties and legislative prerogatives fell well on the side of the individual.[1244] "To be sure," he acknowledged, "striking the balance implies the exercise of judgment" and "[t]his is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause, and it is a task ultimately committed to this Court."[1245]

A third Red Monday decision, *Watkins v. United States*,[1246] gave Chief Justice Warren a forum for delivering a stern rebuke of the House Un-American Activities Committee's investigations, accompanied by a lengthy recitation of famous parliamentary abuses in British history that were well known to eighteenth-century Americans.[1247] Parliament's ill treatment of John Wilkes received a whole paragraph.[1248] John Watkins was a labor union official who had refused to answer some of the questions propounded to him by an HUAC subcommittee.[1249] For that, Watkins was convicted of contempt of Congress.[1250] Even the Attorney General agreed that Watkins had given a "complete and candid statement of his past political associations and activities."[1251] Watkins denied being a Communist, but admitted that he had come into contact with members of the party in his union dealings. Where he balked at answering and became contemptuous in the eyes of Congress was in declaring whether specific individuals were Communists.[1252] These questions had been routine in hundreds of inquiries by the HUAC over the years. Now Chief Justice Warren cast doubt on the very legitimacy of the Committee.

Chief Justice Warren began by stating a premise the government had conceded, "There is no general authority to expose the private affairs of individuals without justification in

1243. *See* Dennis v. United States, 341 U.S. 494, 525–26, 551–52 (1951) (Frankfurter, J., concurring).
1244. *Sweezy*, 354 U.S. at 266–67 (Frankfurter, J., concurring).
1245. *Id.*
1246. 354 U.S. 178 (1957).
1247. *Id.* at 188–192.
1248. *Id.* at 190–91.
1249. *Id.* at 182.
1250. *Id.* at 181–82.
1251. *Id.* at 184 (quoting Brief for Respondent).
1252. *Id.* at 231 (Clark, J., dissenting).

terms of the functions of the Congress."[1253] Congress, he reminded the assembly across the street, was neither "a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."[1254] Legislative inquiries conducted solely "for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible"[1255] Warren admonished. Furthermore, "there is no congressional power to expose for the sake of exposure."[1256] One wonders if Chief Justice Warren was thinking of Senator Joseph McCarthy, who died the previous month, less than three years since he was censured by the Senate for his abusive investigations. Analyzing HUAC's charge from Congress, Chief Justice Warren found it to be of "confusing breadth."[1257] Congress had instructed the HUAC to report on "un-American propaganda activities in the United States," and "all other questions in relation thereto."[1258] "No one," Chief Justice Warren insisted, "could reasonably deduce from the charter the kind of investigation that the Committee was directed to make."[1259] With "slight or non-existent" oversight by Congress, "[t]he Committee is allowed, in essence, to define its own authority, to choose the direction and focus of its activities."[1260] And choose broadly it had. HUAC's "confusing breadth is amply illustrated by the innumerable and diverse questions into which the Committee has inquired under this charter since 1938."[1261]

HUAC, Chief Justice Warren continued, was "a new kind of congressional inquiry unknown in prior periods of American history. . . . This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens."[1262] Watkins had "marshalled an impressive array of evidence" from HUAC's prior work to support the suspicion that the Committee "was engaged in a program of exposure for the sake of

1253. *Id.* at 187.
1254. *Id.*
1255. *Id.*
1256. *Id.* at 200.
1257. *Id.* at 209.
1258. *Id.* at 201–02.
1259. *Id.* at 204.
1260. *Id.* at 203–05.
1261. *Id.* at 209.
1262. *Id.* at 195.

exposure."[1263] Prying into private lives could have enormous costs, Chief Justice Warren wrote, amplifying his remarks from *Sweezy*:

> And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed. Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time.[1264]

If a congressional committee has an "excessively broad charter," as HUAC did, this "places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference."[1265] When Watkins requested that the subcommittee chairman spell out the purpose of the inquiry, the chairman replied that it was "investigating 'subversion and subversive propaganda.'"[1266] By the Chief Justice's reckoning, this "was woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under inquiry."[1267] According to the statute used to convict Watkins, a question had to be "pertinent" to the Committee's legitimate purposes or the witness could refuse to answer with impunity.[1268] That was enough to void the conviction without reaching the First Amendment since it was impossible for a court to know if the queries that Watkins declined to answer were pertinent to HUAC's mission.[1269] It is informative, nonetheless, to notice how broadly Warren condemned the Committee. The specific details

1263. *Id.* at 199.
1264. *Id.* at 197–98.
1265. *Id.* at 205–06.
1266. *Id.* at 214.
1267. *Id.* at 215.
1268. 2 U.S.C. § 192 (1938) (establishing part of the standard of criminality for contempt of Congress as the pertinency of the questions to the witness).
1269. *Watkins,* 354 U.S. at 214–15.

recounted in the opinion damned the Committee as dangerously out of control. For example, the government contended that the Committee called on Watkins as part of a probe of "Communist infiltration in labor" unions.[1270] Warren thought the evidence raised "strong . . . doubt[s] that the subject revolved about labor matters."[1271] Most of the witnesses the Committee questioned "had no connection with labor at all."[1272] Mentioning this point was unnecessary to resolving Watkin's case. As in *Sweezy*, the Chief Justice's rant against HUAC appeared to be more for the sake of publicly rebuking out-of-control legislative investigations than to establish a firm constitutional principle.[1273] Later decisions, we shall see, sustained HUAC's authority to demand that witnesses testify about their own or others' Communist affiliations.

The fourth ruling announced on Red Monday, like the first three, did not expressly rely on the First Amendment, but did reprove the government's notorious loyalty program. John Stewart Service, an "old China hand" in the Foreign Service, came under suspicion of the authorities when he disclosed classified documents to a left-leaning magazine in 1945.[1274] Service did so in the time-honored tradition of influencing public policy through leaks to journalists, but nevertheless, it was imprudent and he got caught.[1275] A grand jury refused to indict Service, and he was reinstated in the State Department, but that did not end his troubles.[1276] Joe McCarthy began his own investigation and accused Service of being a major figure in the supposed ring of Communists at the State Department. Senator McCarthy declared on the Senate floor in 1950 that the State Department was infested by "individuals who are loyal to the ideals and designs of Communism rather than those of the free, God-fearing half of the world."[1277] Service was one of those whom he specifically identified, notwithstanding that nine loyalty boards from 1945–1951 had cleared Service. However, in

1270. *Id.* at 212.
1271. *Id.* at 213.
1272. *Id.*
1273. *See also* Deutch v. United States, 367 U.S. 456 (1961) (finding questions asked of HUAC witness were not pertinent to announced purpose of committee's investigation).
1274. Service v. Dulles, 354 U.S. 363 (1957).
1275. *Id.*
1276. *Id.* at 365.
1277. Joseph McCarthy, *quoted in* Michael T. Kaufman, *John Paton Davies, Diplomat Who Ran Afoul of McCarthy Over China, Dies at 91*, N.Y. TIMES, Dec. 24, 1999, at B10.

April 1951, Truman issued a new executive order on discharging disloyal federal employees.[1278] Previously, employees could be discharged if there were "reasonable grounds" to believe they were disloyal.[1279] The new standard effectively reversed the burden of proof: an employee was to be fired if there was "reasonable doubt" as to disloyalty.[1280] A fresh review of Service's case by the Civil Service Commission's Loyalty Review Board concluded that there were such doubts about Service, based solely on his leak of documents in 1945.[1281] McCarthy brought a great deal of pressure on the State Department to fire the experienced diplomat. Service was discharged despite the State Department's admission that it had no evidence to establish he was a Communist or affiliated with any subversive organization.[1282]

Six years later, the Court overturned Service's firing. Justice Harlan's opinion avoided constitutional considerations and rested on the State Department's failure to follow its own internal procedures in the case. Service regained his position at State, retiring some years later from a minor post at the Liverpool consulate, a once promising career ruined by McCarthy's meddling. That closed a sad chapter that had seen the purging of the State Department's China Desk, removing the longtime veterans with accumulated knowledge of Far Eastern affairs at a time when expertise on that region was critically needed.[1283]

Red Monday notwithstanding, for several years thereafter the Court upheld a variety of laws mandating registration of Communist organizations, signing loyalty oaths, and requiring sworn testimony before legislative or administrative investigating committees about involvement in the Communist Party or similar organizations. HUAC prevailed in convincing the Court that witnesses could be asked whether they or others were or had been members of the party. In other cases, states were allowed to deny bar membership to prospective attorneys if the applicants refused

1278. Exec. Order No. 10,241, 16 Fed. Reg. 3690 (Apr. 28, 1951).
1279. Exec. Order No. 9,835, 12 Fed. Reg. 1935 (Mar. 21, 1947).
1280. Exec. Order No. 10,241, 16 Fed. Reg. 3690 (Apr. 28, 1951).
1281. *Service*, 354 U.S. at 366–67.
1282. *Id.* at 367 n.8.
1283. *See generally* HARVEY KLEHR & RONALD RADOSH, THE AMERASIA SPY CASE: PRELUDE TO MCCARTHYISM (1996) (relaying the story of John Stewart Service). *See also* John Kifner, *John Service, a Purged 'China Hand,' Dies at 89*, N.Y. TIMES, Feb. 4, 1999, at B11 (discussing the historical events surrounding John Stewart Service's life).

to reveal past Communist connections. These rulings came despite an earlier decision that mere past membership in the Communist Party was not a sufficient ground to exclude an otherwise qualified person from the practice of law. Justice Black had written for the Court that it "cannot automatically be inferred that all members shared" the ends of the groups to which they belonged.[1284] However, failure to provide information to the bar was another matter, the Court held in two 1961 cases, because obstinacy obstructed the bar's ability to follow leads as to the applicant's character.[1285] Likewise, the refusal of a subway conductor to answer whether he was a Communist Party member was considered by the Court in a 1958 decision to be a sufficient basis for firing the employee.[1286] In his majority opinion, Justice Harlan reasoned that the conductor had not been penalized for associating with Communists. Rather, his "lack of frankness" raised a "doubt" about the man's "trust and reliability," no different than "if he had refused to give any other information about himself which might be relevant to his employment."[1287]

Three rulings issued on the same day in June 1961 produced a mixed result for the party, but overall demonstrated that *Yates* did

1284. Schware v. Bd. of Bar Exam'rs of New Mexico, 353 U.S. 232, 246 (1957). *See also* Konigsberg v. State Bar of California & the Comm. of Bar Exam'rs of California, 353 U.S. 252, 273 (1957) (holding that past Communist membership is not enough to exclude a person from the bar).

1285. *In re* Anastaplo, 366 U.S. 82, 96–97 (1961) (holding that Illinois could constitutionally adopt a court-made rule preventing applicants from admission to the practice of law for refusing to answer questions regarding Communist Party affiliation); Konigsberg v. State Bar of California & the Comm. of Bar Exam'rs of California, 366 U.S. 36, 1009–10 (1961) (holding that admission to the practice of law could be denied to applicant who refused to answer questions about Communist Party membership).

1286. Lerner v. Casey, 357 U.S. 468, 476 (1958) (interpreting the court of appeals' opinion as indicating that "a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness.").

1287. *Id.* at 476. For other cases on compulsory disclosure of Communist associations, see Braden v. United States, 365 U.S. 431 (1961) (holding that witness was not immune from conviction for refusing to answer questions asked by HUAC); Wilkinson v. United States, 365 U.S. 399 (1961) (upholding contempt conviction for defendant's refusal to answer any questions asked of him by HUAC); Barenblatt v. United States, 360 U.S. 109 (1959) (upholding conviction for refusing to answer questions at a HUAC hearing about Communist involvement); Uphaus v. Wyman, 360 U.S. 72 (1959) (agreeing that state could force witness to identify guests and speakers at a Communist-affiliated summer camp); Beilan v. Bd. of Pub. Educ., Sch. Dist. of Philadelphia, 357 U.S. 399 (1958) (upholding dismissal of a teacher for refusing to answer questions about Communist associations).

not spell constitutional immunity for the party or its members. In *Communist Party v. Subversive Activities Control Board*,[1288] the Court approved an order requiring the party to register as a "Communist-action organization," meaning that it was found to be "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement."[1289] Individual party members also were compelled to register. Registration, as indicated earlier, had serious consequences for both the organization and its members. Justice Frankfurter's 5-4 majority decision had to distinguish several pesky precedents involving more sympathetic groups. One of these, *NAACP v. Alabama* ex rel. *Patterson*,[1290] decided in 1958, sustained the right of the Alabama chapter of the civil rights organization to refuse giving the state a member list as part of an inquiry into whether the NAACP needed to register as an out-of-state corporation. To hold for the NAACP, the Court first explicitly recognized "that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[1291] Among other purposes, group association served the vital purpose of enhancing advocacy "of both public and private points of view, particularly controversial ones."[1292] Revelation of members' identities had in the past led "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[1293] Communists faced the same types of retaliation, but nonetheless the registration order for them was held valid. Elucidating the difference between the NAACP's situation and the Communist Party's, Frankfurter noted that Alabama had offered no serious justifications for the NAACP membership disclosure, whereas the federal act "compels the registration of organized groups which have been made the instruments of a long-continued, systematic, disciplined activity directed by a foreign power and purposing to overthrow existing government in this country."[1294] True to his

1288. 367 U.S. 1 (1961).
1289. *Id.* at 8.
1290. 357 U.S. 449 (1958).
1291. *Id.* at 460.
1292. *Id.*
1293. *Id.* at 462.
1294. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 105 (1961).

personal philosophy of judicial restraint, Frankfurter would not question Congress' judgment here any more so than he had in *Dennis*—"the legislative determination must be respected."[1295]

A second case decided that day (June 5, 1961) gave the Court's stamp of approval to the membership section of the Smith Act, which made it illegal to belong to a group advocating the forcible overthrow of the government. *Scales v. United States*[1296] presented the saga of Junius Irving Scales, the scion of a prominent North Carolina family who became a Communist during his university days at Chapel Hill. (His parents should have known better than to name him Junius, the pen name of the late eighteenth-century British radical writer who had flouted the press laws of his day.) Scales was an idealistic young man, who like many at the time took deep offense at the persistence of poverty and racism, particularly in the South, and became convinced that capitalism impeded progress toward equality. Scales quickly ascended through the Party ranks, becoming its coordinator for labor and civil rights issues in several Southern states. Eventually, Scales went underground to avoid FBI surveillance. Following his arrest in 1954 for being a member of the Party, some seven years of Scales' life were consumed by legal proceedings that culminated in his conviction and imprisonment. During the pendency of the proceeding, Scales himself broke with the Party after Khrushchev revealed Stalin's atrocities in 1956. As Scales wrote in his memoir:

> Stalin—my revered symbol of the infallibility of Communism, the builder of socialism in one country, the rock of Stalingrad, the wise, kindly man with the keen sense of humor at whose death I had wept just three years before—*Stalin*, on the admission of his former idolators, had been a murderous, power-hungry monster![1297]

Nevertheless, the government pursued Scales doggedly through two trials and two Supreme Court appeals, and eventually a six-year sentence was affirmed solely for Scales' membership in the party. A public outcry by various notorieties, including an editorial by the *New York Times* calling him "a misguided idealist,"[1298] urged his release. "There is something un-American in having

1295. *Id.* at 97.

1296. 367 U.S. 203 (1961).

1297. JUNIUS IRVING SCALES & RICHARD NICKSON, CAUSE AT HEART: A FORMER COMMUNIST REMEMBERS (1987).

1298. Ari L. Goldman, *Junius Scales, Communist Sent to U.S. Prison, Dies at 82,* N.Y. TIMES, Aug. 7, 2002, at C23.

even one political prisoner in the United States," the *Times* editorialized.[1299] President Kennedy commuted Scales' sentence after fifteen months.[1300] Scales left the penitentiary with a keen desire for obscurity—he spent the next twenty years as a proofreader for the *Times*.[1301]

In upholding Scales' conviction, Justice Harlan—the author of *Yates*—quickly dispatched Scales' First Amendment objections. *Dennis* had "settled" the issue that the party was not engaged in "constitutionally protected speech," and a "combination to promote such advocacy" was not a form of association entitled to First Amendment protection.[1302] Key to the distinction between *Yates* and *Scales*, Harlan explained, was the statute's requirement that the "defendant 'specifically intend(s) to accomplish (the aims of the organization) by resort to violence.'"[1303] This was a critical requirement, for it meant that "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit.'"[1304] Junius Scales did not personally benefit from this proviso, as there was ample proof that he had worked assiduously to accomplish the Party's illegal ends. Nevertheless, the decision effectively minimized the importance of the membership clause. If a conviction could be obtained only by proof that the defendant actually had violated the advocacy section of the Smith Act or some other statute dealing with insurrection, then the membership ban served no independent purpose. Underscoring that point, a third case decided that day, *Noto v. United States*,[1305] reversed a conviction under the Smith Act's membership clause for lack of evidence that the defendant had engaged in subversive advocacy.[1306] Justice Harlan concluded that the government's case "bears much of the infirmity that we found in the *Yates* record, and requires us to conclude that the evidence of illegal Party advocacy was insufficient

1299. *Id.*
1300. *Id.* *See also* SCALES & NICKSON, *supra* note 1297 (discussing Scales' life).
1301. Goldman, *supra* note 1298.
1302. Scales v. United States, 367 U.S. 203, 228 (1961).
1303. *Id.* at 229 (quoting Noto v. United States, 367 U.S. 290, 299 (1961)).
1304. *Id.* at 229–30.
1305. 367 U.S. 290 (1961).
1306. *Id.* at 299.

to support this conviction."[1307] No other prosecutions were brought under the membership clause after *Scales* and *Noto*.

The *Yates-Scales-Noto* line of cases was largely based on statutory interpretation, but cases later in the 1960s treated their principles as mandated by the First Amendment. Organizations could have both legal and illegal goals, Harlan noted in his *Scales* opinion.[1308] Enforcing "a blanket prohibition of association"[1309] with such a dual-purpose group, *Scales* found, and later cases repeated, "would pose 'a real danger that legitimate political expression or association would be impaired.'"[1310] To impose a penalty based on association with an organization, the state must prove—as a constitutional minimum—that a person's membership was "accompanied by a specific intent to further the unlawful aims of the organization."[1311] Repeating a line from *Cantwell* in a 1966 case, the Court reiterated the essential point that "[a] statute touching those protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.'"[1312]

For example, in a 1967 decision, *United States v. Robel*,[1313] the Court scrutinized the Internal Security Act's prohibition against employment of members of "Communist-action organizations" in any "defense facility." Eugene Robel had been a machinist at a Seattle shipyard for ten years, all the while an out-of-the-closet Communist Party member.[1314] Because of his membership, Robel should have resigned after the Secretary of Defense designated the shipyard as a "defense facility" in 1962.[1315] In a 5-4 decision with Chief Justice Warren writing for the majority, the Court found Robel's criminal indictment for failing to quit as fatally defective.[1316] At first glance, this result seems a startling conclusion (the dissenters certainly thought so). One might reasonably think that a person belonging to an organization dedicated to overthrowing the government would be an unacceptable security risk at a defense

1307. *Id.* at 291.
1308. *Scales,* 367 U.S. at 229.
1309. *Id.*
1310. Elfbrandt v. Russell, 384 U.S. 11, 15 (1966).
1311. *Id.* at 16.
1312. *Id.* at 18 (quoting Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)).
1313. 389 U.S. 258 (1967).
1314. *Id.* at n.10.
1315. *Id.* at 260.
1316. *Id.* at 260–61.

establishment. But Warren refused to accept at face value the government's assertion of "national defense"[1317] as a justification for a law that "cut deeply into the right of association."[1318] His point was not to dismiss the Government's concerns for sabotage and espionage, which were "not insubstantial."[1319] Rather, he faulted the statute for its imprecision, by "indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed."[1320] Regardless of the law's legitimate purpose, it "quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it."[1321] The law's broad "net"[1322] would snare the employee who was an "inactive or passive member" of the tainted organization; it reached someone who was "unaware of the organization's unlawful aims," or who disagreed with them.[1323] Not only that, the ban was comprehensive, encompassing all employment within a defense facility regardless of whether the individual held "a nonsensitive position."[1324] With a memorable line, Warren concluded this about the law: "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."[1325]

As the 1960s unfolded, claims of associational rights increasingly came before the Court and in a variety of contexts, each requiring a different weighing of personal liberties against assertions of national security. More and more, the Warren Court found that the freedom to associate had been unduly undermined by measures designed to discourage membership in radical organizations. For example, in a 1960 case, *Shelton v. Tucker*,[1326] Arkansas demanded that all schoolteachers and college professors in the state list the names and addresses of every organization that they had belonged to or contributed to in the previous five years.

1317. *Id.* at 264.
1318. *Id.*
1319. *Id.*
1320. *Id.* at 266.
1321. *Id.* at 265.
1322. *Id.*
1323. *Id.* at 266.
1324. *Id.*
1325. *Id.* at 264.
1326. 364 U.S. 479 (1960).

Such a "completely unlimited"[1327] inquiry created an "atmosphere of suspicion and distrust"[1328] under which "[s]cholarship cannot flourish,"[1329] Justice Stewart wrote for the Court in defense of academic freedom. A teacher would have to disclose her church, political party and every cause to which she had contributed. To top it off, the state did not guarantee the confidentiality of the disclosures. Arkansas surely had a strong interest in the qualifications of its teachers, Stewart allowed, but the disclosure law "[went] far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[1330] What the state could lawfully do was pose more finely-tuned questions to teachers, such as whether they belonged to specific groups, how many organizations they belonged to, and the amount of time consumed by these activities. The important point was that government must accomplish even legitimate purposes by using means that imposed the least restrictions on speech.[1331] Finding that alternative ways existed to get the same result with fewer burdens on expression raised the suspicion that the state's real purpose was to stifle communication.

By the early 1970s, the era of loyalty oaths and legislative or bar association investigations into Communist groups largely came to a close. Two decisions in 1971 rebuffed state rulings that denied bar membership based on the applicants' refusal to state whether they belonged to an organization seeking the violent overthrow of the government.[1332] Justice Black's plurality opinion in one of these cases regarded these inquiries as intolerable, as they forced the applicant "to make a guess as to whether any organization to which she ever belonged 'advocates overthrow of the United States Government by force or violence.'"[1333] Drawing upon prior rulings, Black concluded that a state was prohibited from "excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs."[1334] That being true, the First Amendment likewise

1327. *Id.* at 488.
1328. *Id.* at 487 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).
1329. *Id.*
1330. *Id.* at 490.
1331. *See id.* at 488.
1332. Application of Stolar, 401 U.S. 23 (1971); Baird v. State Bar of Ariz., 401 U.S. 1 (1971).
1333. *Baird*, 401 U.S. at 5.
1334. *Id.* at 6.

did not countenance "[b]road and sweeping state inquiries into these protected areas,"[1335] which inevitably "discourage[d] citizens from exercising rights protected by the Constitution."[1336]

A third case, decided on the same day as the other two bar applications cases, however, upheld a New York requirement that applicants for the state bar certify that he or she believes in "the form of the government of the United States and is loyal to such government . . . ."[1337] In addition, applicants must tell whether they belonged to a group that taught or advocated[1338] that the government would be overthrown by illegal means, and if the answer was positive, whether they had "the specific intent to further the aims of such organization . . . ."[1339] None of the plaintiffs in the case had yet been subjected to these provisions—theirs was a class action comprised of people who were "seeking or planning to seek admission to practice law in New York."[1340] The first of the requirements, Justice Potter Stewart wrote for a 5-4 majority, had been interpreted narrowly by the state to "mean no more than willingness to take the constitutional oath and ability to do so in good faith."[1341] As to the question about organizations, it was "precisely tailored to conform to the relevant decisions of [the] Court."[1342] It was "well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer."[1343] To this he added a curious point: no one had ever been denied admission to the New York Bar "because of his answers to these or any similar questions, or because of his refusal to answer them."[1344] The plaintiffs had contended that "by its very existence" New York's system for ferreting out disloyal lawyers "works a 'chilling effect' upon the free exercise of the rights of speech and association of students who must anticipate having to meet its

1335. *Id.*
1336. *Id. See also Stolar*, 401 U.S. at 23 ("[S]tate could not require applicant to state whether he has been or is member of [an] organization that advocates overthrow of government of United States by force.").
1337. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 155 (1971).
1338. *Id.* at 164.
1339. *Id.* at 165.
1340. *Id.* at 157.
1341. *Id.* at 163.
1342. *Id.* at 165.
1343. *Id.* at 165–66.
1344. *Id.* at 165.

requirements."[1345] Justice Stewart in effect told them to thaw out—New York had "shown every willingness to keep their investigations within constitutionally permissible limits."[1346]

A little more than a year later, the Court took up its last significant employee loyalty-oath case, *Cole v. Richardson*.[1347] Massachusetts insisted that all public employees sign the following oath as a condition of employment:

> I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.[1348]

An employee at a state hospital refused to sign, asserting that the oath was unconstitutional.[1349] Not so, Chief Justice Burger replied for the majority.[1350] Before reaching the oath in question, Burger reviewed and categorized the Court's prior holdings on the subject.[1351] "We have made clear," he started, "that neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs."[1352] Public employees could not be forced as a condition of employment to swear that they had not or would not engage "in protected speech activities such as the following: criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office."[1353] By the same token, a public sector job could not be conditioned on past of future associations with others that were constitutionally protected.[1354] Here, Chief Justice Burger tied the legality of membership oaths to the Court's decisions on the First Amendment constraints against punishing a person for merely belonging to a group: "protected

1345. *Id.* at 159.
1346. *Id.* at 167.
1347. 405 U.S. 676 (1972).
1348. *Id.* at 677–78.
1349. *Id.* at 678.
1350. *Id.* at 687.
1351. *Id.* at 680.
1352. *Id.* at 680.
1353. *Id.*
1354. *Id.*

activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose."[1355]

Applying these doctrines to the Massachusetts oath, Chief Justice Burger's opinion found no constitutional violations. In doing so, he explicitly noted "[a]n underlying, seldom articulated concern running throughout these cases" about oaths.[1356] This was the difference between oaths that involved past actions by the employee and those "addressed to the future, promising constitutional support in broad terms."[1357] Those in the first category had "often required individuals to reach back into their past to recall minor, sometimes innocent, activities. They put the government into 'the censorial business of investigating, scrutinizing, interpreting, and then penalizing or approving the political viewpoints' and past activities of individuals."[1358] Public employees could not be terminated solely for refusing to swear that they had not previously engaged in disloyal acts.[1359] Due process demanded in those cases that the government hold "a hearing, showing evidence of disloyalty, and allowing the employee an opportunity to respond might the State develop a permissible basis for concluding that the employee was to be discharged."[1360] That was in contrast to the instant situation, in which the employee had been asked to commit herself to *future* loyalty.[1361] The first clause of the oath ("uphold and defend the Constitution")[1362] was no different in substance from the oaths specified in the Constitution for the President and members of Congress. "Although in theory the First Amendment might have invalidated those provisions," Chief Justice Burger added, "approval of the amendment by the

1355. *Id.*
1356. *Id.* at 681.
1357. *Id.*
1358. *Id.* (quoting Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 192 (1971) (Marshall, J., dissenting)).
1359. *Id.* at 686 (citing Nostrand v. Little, 362 U.S. 474 (1960) and Connell v. Higginbotham, 403 U.S. 207 (1971)).
1360. *Id.* at 686.
1361. *Compare Nostrand,* 362 U.S. at 474 (requiring "every public employee to subscribe to an oath that he *is* 'not a subversive person or a member of the Communist Party or any subversive organization . . . .'"), *with* Cole v. Richardson, 405 U.S. 676, 677 (1972) (requiring subscription to an oath stating "'I *will* uphold and defend the Constitution of the United States of America . . . and that I *will* oppose the overthrow of the government of the United States . . . .'") (emphasis added).
1362. *Cole,* 405 U.S. at 677.

same individuals who had included the oaths in the Constitution suggested strongly that they were consistent."[1363] As in similar oaths the Court had upheld, it was nothing more than an "acknowledgment of a willingness to abide by 'constitutional processes of government,'"[1364] which he thought was not too much to ask of a public employee. "Since there is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means, no constitutional right is infringed by an oath to abide by the constitutional system in the future."[1365]

The second clause in the Massachusetts oath ("I will oppose the overthrow of the government") was "essentially the same as the first," Chief Justice Burger thought.[1366] He would not "presume" that this "impose[s] obligations of specific, positive action on oath takers."[1367] If the state *were* to demand specific acts from the oathsayer, this "would raise serious questions whether the oath was so vague as to amount to a denial of due process."[1368] But no one had ever been prosecuted for perjury on account of failing to live up to this promise, and if there was "a record of actual prosecutions or harassment through threatened prosecutions, we might be faced with a different question."[1369] Massachusetts had thus won a Pyrrhic victory. Chief Justice Burger's caveats had left the oath, and ones like it, so innocuous that they amounted to nothing more than a general agreement by the employee to abide by the Constitution.

Two years later, in 1974, the Court decided its last loyalty oath case to date. Unlike the prior cases, which had dealt with oaths to obtain public employment, bar admission and tax exemptions, *Communist Party of Indiana v. Whitcomb*[1370] involved elections. Indiana had an election law that demanded all political parties seeking a spot on the ballot to submit an oath swearing that the

1363. *Id.* at 682.
1364. *Id.* (citing Bond v. Floyd, 385 U.S. 116, 135 (1966)).
1365. *Id.* at 686. *See also* Connell v. Higginbotham, 403 U.S. 207, 208 (1971) (invalidating an employee oath that required affiants to swear that they did "not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence." This violated the rule "proscribing summary dismissal from public employment without hearing or inquiry required by due process.").
1366. *Id.* at 683.
1367. *Id.* at 684.
1368. *Id.* at 684–85.
1369. *Id.* at 685.
1370. 414 U.S. 441 (1974).

organization did not advocate the overthrow of the government by force.[1371] A twist on this scheme was that a political party also had to insert a plank in its platform specifically disavowing such a revolutionary intent.[1372] Justice Brennan's majority opinion found the same flaw in the Hoosier statute that had sunk other loyalty oaths—it was "not limited to advocacy of action,"[1373] and therefore interfered with associational rights. In this instance, the constitutional failing was exacerbated by the law's application to the franchise, because "free and unimpaired" voting was "preservative of other basic civil and political rights."[1374]

As the Court wound up the era of subversive activity cases, its explanation of both older decisions and the methodology used in the newer ones would have important ramifications far beyond radical organizations. Theories that had been developed for entirely different areas of the law were fashioned into First Amendment doctrines. *Whitcomb*, for example, relied in part on cases dealing with voting rights to buttress its conclusion about political association.[1375] A moment ago we reviewed another example in *Shelton v. Tucker*.[1376] There the methodology employed, pinpointing a less restrictive alternative—which had originated as a tool in equal protection analysis—would be applied to a range of First Amendment cases having nothing to do with compulsory disclosures of information.[1377] Two other examples are the doctrines of overbreadth and vagueness. An overbroad law would be one that in some respects regulated expression in a constitutional manner, but at the same time potentially proscribed protected speech. As the Court said in *Shelton*,

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[1378]

1371. *Id.* at 442–43.
1372. *Id.* at 443 n.1 (construing IND. CODE § 29-3812 (1969)).
1373. *Id.* at 447.
1374. *Id.* at 450 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).
1375. *See id.*
1376. 364 U.S. 479 (1960).
1377. *Id.* at 493–94.
1378. *Id.* at 488.

An overbroad law is completely invalid, even if it might have some constitutional usages, as the Court will not "leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution."[1379] *Robel* was an instance of a law suffering the "fatal defect of overbreadth," inasmuch as it sought "to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights."[1380] A law could be doubly flawed by being both excessively vague and overbroad. *Shelton* fell into that category, although the Court did not use the yet-to-be-minted term "overbreadth." At once the Arkansas law had an indefinite scope while at the same time it had enough clearly plausible (yet unconstitutional) applications to render it incurably overbroad.[1381]

By interring a statute for not being "narrowly drawn," the Justices need not—and usually do not—have to decide whether the particular speech or associational activities involved in the case would be subject to sanction under a properly drafted statute. For example, consider *Aptheker v. Secretary of State*,[1382] a 1964 case that resolved whether the law forbidding Communist Party members from applying for or using a U.S. passport was constitutional. The dispute arose when the government refused to issue passports to Elizabeth Gurley Flynn and Herbert E. Aptheker, two highly visible Communists who made no secret of their party affiliations.[1383] Flynn had been convicted under the Smith Act in the "second wave" of prosecutions after *Dennis v. United States* and spent more than two years in prison as a result.[1384] (She did not get the benefit of *Yates*' revisionism because her sentence was completed by the time it was decided.) In 1961, she became chair of the national

1379. Smith v. California, 361 U.S. 147, 151 (1959).
1380. United States v. Robel, 389 U.S. 258, 266 (1967).
1381. Shelton v. Tucker, 364 U.S. 479, 489 (1960). *See also, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 598–99 (1967) (striking New York law requiring removal of teachers for "seditious utterances" because "the possible scope of 'seditious' utterances or acts has virtually no limit."); Whitehill v. Elkins, 389 U.S. 54, 55 (1967) (striking teacher oath as overbroad that required swearing, "I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.").
1382. 378 U.S. 500 (1964).
1383. *See id.* at 504.
1384. *Id.* at 524 (Clark, J., dissenting).

committee of the U.S. Communist Party.[1385] Aptheker was a noted Marxist historian—a recognized expert on Afro-American history—and editor of the American Communist Party's theoretical journal.[1386] The FBI considered Aptheker "the most dangerous communist in the United States,"[1387] which at least shows that the Feds appreciated the power of ideas. Both eventually obtained their passports after the Court found the statute unconstitutional on its face.[1388] (Flynn used her new passport to visit Moscow, where she died, proving that success is sometimes a mixed blessing. But the Soviets did give her a state funeral in appreciation of her prodigious efforts on behalf of communism, so the trip was not entirely a bust.) Two rights were at risk by the passport denials—the right to travel and the right to associate with others for political purposes.[1389] Justice Arthur J. Goldberg upheld both rights by finding that the flat travel ban for all party members swept "unnecessarily broadly."[1390] It reached members of "Communist-action"[1391] organizations who were unaware of its ultimate objectives. Furthermore, the prohibition was indiscriminate, barring exit to Communists for all purposes, even "to visit a sick relative, to receive medical treatment, or for any other wholly innocent purpose."[1392] Aptheker would be unable to travel abroad to study rare manuscripts; he was forbidden to do so "regardless of the security-sensitivity of the areas in which he wishes to travel."[1393] And the law left significant gaps if it really was intended to protect national security—Communists were free to travel without a passport anywhere in the Western hemisphere except Cuba.[1394] By declaring the statute overbroad, the Court took care of the immediate controversy without identifying the circumstances under

1385. *Id.* at 515.
1386. *Id.*
1387. Clayborne Carson, *African-American History Loses Three Past Masters*, 31 Organization of American Historians Newsletter, May 2003, at 20.
1388. *Aptheker*, 378 U.S. at 517.
1389. *Id.* at 507.
1390. *Id.* at 508.
1391. *Id.* at 509.
1392. *Id.* at 511.
1393. *Id.* at 512.
1394. *Id.* at 507.

which a Communist could be forced to remain in the United States.[1395]

Overbreadth became a victim of its own usefulness for those attacking statutes restricting speech. Under this doctrine, a litigant is allowed challenge a statute as overbroad in its potential application to others not before the Court, even though the law could be constitutionally applied in the instant case. In a 1973 ruling, *Broadrick v. Oklahoma*,[1396] a slim majority held that the overbreadth must be both "real" and "substantial as well, judged in relation to the statute's plainly legitimate sweep."[1397] The terms "real" and "substantial" can fairly be described as themselves indeterminate, which not surprisingly explains why subsequent overbreadth cases are so hard to reconcile with one another. Justice White's *Broadrick* opinion admitted as much, saying that it "remains a 'matter of no little difficulty' to determine when a law may properly be held void on its face."[1398]

The unmistakable signal from *Broadrick* was that overbreadth was a "last resort,"[1399] to be used "sparingly,"[1400] especially "where conduct and not merely speech is involved . . . ."[1401] At least three reasons explain why. First, in successfully invoking overbreadth, a person whose activities undeniably were illegal and not constitutionally protected escapes liability. Second, the Justices are speculating as to how the law would be applied in other situations, and as a rule they prefer to wait for concrete facts so as to better understand the implications of their rulings. Finally, a finding of overbreadth kills the statute entirely, leaving the state in the lurch, and giving legislators few clues as to how to construct a constitutional statute. For all these reasons, the Court has "generally disfavored" obliterating a law totally and prefers to judge a statute's constitutionality "as applied" to the particular challenger.[1402] *Broadrick*'s downside, as Justice Brennan's dissent argued, is that leaving a defective law in place will have a "chilling

1395. On Flynn's earlier Smith Act conviction, see United States v. Flynn, 103 F. Supp. 925 (S.D.N.Y. 1951), *aff'd*, 216 F.2d 354 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955).
1396. 413 U.S. 601 (1973).
1397. *Id.* at 615.
1398. *Id.* (quoting Coates v. City of Cincinnati, 402 U.S. 611, 617 (1971)).
1399. *Id.* at 613.
1400. *Id.*
1401. *Id.* at 615.
1402. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990).

effect" on others.[1403] While others can always bring their own claims, this is costly and time-consuming.

Excessive vagueness proved to be the undoing of a number of laws relating to free expression that the Court reviewed the 1960s and later, although the concept appeared as early as 1931 in the "red flag" case, *Stromberg v. State of California*.[1404] Vagueness is generally unacceptable in criminal laws as a matter of due process, and applies in non-speech contexts as well as First Amendment cases.[1405] People are entitled to sufficient notice of a law's strictures so that they may avoid violating it. Furthermore, ambiguous laws may be wielded selectively against those who for one reason or another have irked the authorities. For that reason, vagueness is especially incompatible with First Amendment values. Uncertain meanings lead those affected to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."[1406] Consequently, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[1407] Vagueness in loyalty oaths had been of "especially great" concern to the Court, Chief Justice Burger wrote in *Cole*, "because uncertainty as to an oath's meaning may deter individuals from engaging in constitutionally protected activity conceivably within the scope of the oath."[1408]

Formally speaking, the test for vagueness in a statute with First Amendment implications is the same as that for any criminal statute: "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law."[1409] Unfortunately, and surely ironically, the standard for ascertaining vagueness is itself vague, with the result that the scores of cases deciding whether statutes are unduly indefinite cannot readily be reconciled with one another. A few examples will at least illustrate the Court's methodology for ascertaining vagueness.

1403. *Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting).
1404. 283 U.S. 359 (1931).
1405. Baggett v. Bullitt, 377 U.S. 360, 367 (1964).
1406. *Id.* at 372 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
1407. Smith v. State of California, 361 U.S. 147, 151 (1959) (quoted in Cramp v. Bd. of Pub. Instruction of Orange County, Fla., 368 U.S. 278, 287 (1961)).
1408. Cole v. Richardson, 405 U.S. 676, 681 (1972).
1409. *Baggett*, 377 U.S. at 367.

Florida had a law in 1961 that directed all state employees to sign an oath swearing among other things that they had not and would not "lend . . . aid, support, advice, counsel or influence to the Communist Party."[1410] A unanimous Court in *Cramp* determined that these words were "extraordinary" in their ambiguity.[1411] Justice Stewart came to this conclusion by imagining possible ways in which the law could be interpreted.[1412] What if an employee simply had voted for a Communist candidate in an election?[1413] Or defended the constitutional rights of a Communist?[1414] Or supported a cause that was also being advanced by the Communist Party?[1415] "Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his 'counsel' to the Party?"[1416] These may seem like absurd possibilities, Stewart granted, but that was a testament to the haziness of the oath's language.[1417] "With such vagaries . . . ," Stewart maintained, "it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive."[1418] Worse yet, a perjury prosecution possibly awaited any signer whose actions were later found to have aided the Communist Party in some fashion.[1419] Relying on the good faith of prosecutors was unacceptable: "[i]t would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human."[1420]

Baggett v. Bullitt,[1421] decided in 1964, involved two oaths that teachers in Washington State

> were obliged to sign as a condition of employment. In one of these, the teacher pledged to: support the constitution and laws of the United States of America and

1410. *Cramp*, 368 U.S. at 279.
1411. *Id.* at 286.
1412. *Id.*
1413. *Id.*
1414. *Id.*
1415. *Id.*
1416. *Id.*
1417. *Id.*
1418. *Id.*
1419. *Id.*
1420. *Id.* at 286–87.
1421. 377 U.S. 360 (1964).

> of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.[1422]

A second oath, applicable to all Washington state employees, had the individual swear that he or she was not a "subversive person" within the meaning of state law.[1423] A subversive person, in turn, was defined as "any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit . . . any act [designed] to overthrow, destroy or alter . . . the [present] constitutional form of government . . . by revolution, force, or violence."[1424] No employee could be a member of a "subversive organization," knowing its illegal purposes.[1425] The Communist Party earned the special notice from the legislature, which declared it to be such an organization.[1426] Some of the plaintiffs were professors at the University of Washington, and they may very well have had Communist students in their classes.[1427] The professors were prescient in that within a few years their classes included radical leftists who belonged to groups that fell within Washington's definition of a subversive person.

Justice White's majority opinion sided with the employees, agreeing that teachers might construe the oaths in entirely different ways.[1428] Many of the same hypothetical applications of the Florida law in *Cramp* also were plausible interpretations of the Washington oaths.[1429] University professors had even more to worry about in this regard than other state workers.

> Persons required to swear they understand this oath may quite reasonably conclude that any person who aids the Communist Party or teaches or advises known members of the Party is a subversive person because such teaching or

1422. *Id.* at 361–62.
1423. *Id.* at 362.
1424. *Id.*
1425. *Id.*
1426. *Id.* at 363.
1427. *Id.* at 361.
1428. *Id.* at 371.
1429. *Id.* at 368.

> advice may now or at some future date aid the activities of the Party.[1430]

Could a professor attend a conference at which scholars from Communist countries attended? Or have a professional conversation with such a person? And so on. Washington prohibited aiding a "revolution" to change "the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them."[1431] Since a "revolution" could be nonviolent, White posed another series of hypotheticals: "[w]ould, therefore, any organization or any person supporting, advocating or teaching peaceful but far-reaching constitutional amendments be engaged in subversive activity? Could one support the repeal of the Twenty-second Amendment or participation by this country in a world government?"[1432]

The flag portion of the oath fared no better. "The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed,"[1433] White stated as he again raised a series of possible interpretations. "Even criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath."[1434] "And," White said with a just a touch of sarcasm, "what are 'institutions' for the purposes of this oath?"[1435] More hypotheticals followed. "The oath may prevent a professor from criticizing his state judicial system or the Supreme Court or the institution of judicial review. Or it might be deemed to proscribe advocating the abolition, for example, of the Civil Rights Commission, the House Committee on Un-American Activities, or foreign aid."[1436]

Dozens of other speech-related vagueness cases could be cited at this point. They are a frustrating lot to reconcile, as statutory ambiguity lies largely in the eye of the beholder. What did the Massachusetts law in *Cole* mean by "uphold and defend the Constitution,"[1437] and how was a teacher there to understand the

1430. *Id.* at 367–68.
1431. *Id.* at 362.
1432. *Id.* at 370.
1433. *Id.* at 371.
1434. *Id.*
1435. *Id.*
1436. *Id.*
1437. Cole v. Richardson, 405 U.S. 676, 678 (1972).

duty to "oppose the overthrow of the government"?[1438] Chief Justice Burger would not "presume" that this language imposed specific obligations,[1439] even though in *Cramp* and *Baggett* the Court regarded similarly indefinite language as bad for its "potential deterrence of constitutionally protected conduct,"[1440] by causing teachers to "'steer far wider of the unlawful zone' than if the boundaries of forbidden areas were clearly marked."[1441] When this concern was raised in *Cole*, Chief Justice Burger replied that no one should be worried about the "prophecy of dire consequences . . . 'while this Court sits.'"[1442] That phrase—"while this Court sits"—originated in a Holmes dissent to a tax decision,[1443] and became one of Chief Justice Burger's favorite judicial quotations. As majestic as it sounds, the Court scarcely has time to rule on more than a minute portion of potentially unconstitutional laws. Favoring "as applied" attacks against facial challenges to a law's clarity has the same shortcoming that limits on the use of overbreadth produce—leaving a law on the books that will put the speech of others not before the Court on ice. On the other hand, facial invalidation for vagueness has most of the same drawbacks as can occur when a law is annulled for overbreadth.

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Before leaving our study of the second Red Scare, a case from 1964 must be introduced, even though it has nothing to do with Communists or subversive speech. Up until that point, the Court had never formally interred the notion that government could punish seditious libels against officials, as had occurred under the Sedition Act of 1798. It would do so in *New York Times v. Sullivan*,[1444] a libel suit brought by one L.B. Sullivan, the commissioner of police in Montgomery, Alabama.[1445] His beef was over a full-page ad in the *Times* taken out by civil rights advocates to publicize their cause and raise funds.[1446] The thrust of the ad's appeal was that "an

1438. *Id.* at 692.
1439. *Id.* at 684.
1440. Cramp v. Bd. of Pub. Instruction of Orange County, Fla., 368 U.S. 278, 283 (1961).
1441. *Baggett*, 377 U.S. at 372 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
1442. *Cole*, 405 U.S. at 686.
1443. Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).
1444. 376 U.S. 254 (1964).
1445. *Id.* at 256.
1446. *Id.*

unprecedented wave of terror" had been launched by unnamed officials in the South against protesters.[1447] To support this allegation, the ad contained a list of specific incidents, most of which were accurate or at worst mild exaggerations.[1448] A few, regrettably, were false. For example, it mentioned that Dr. Martin Luther King, Jr. had been arrested seven times on frivolous charges; the actual number was four.[1449] Police were accused of "ringing" the campus of a black college in Montgomery,[1450] when in actuality they were merely "deployed near the campus in large numbers on three occasions" in connection with protests.[1451] Authorities supposedly padlocked the student cafeteria "in an attempt to starve them into submission," which never occurred.[1452] Dr. King's home had been bombed twice, as the ad alleged, but this occurred before Sullivan became commissioner, and in any event the police claimed to have investigated these crimes vigorously.[1453] Perjury charges were pending against King, as the ad said (he was later acquitted), yet Sullivan had nothing to do with his indictment.[1454] Students were said to have sang 'My Country, 'Tis of Thee' on the state capitol steps, when in fact it was the National Anthem.[1455]

At the demand of the Alabama governor, the *Times* later printed a retraction of the mistakes.[1456] A Montgomery jury nevertheless awarded Sullivan $500,000 against the newspaper and four black clergymen whose names appeared in the ad as endorsers.[1457] Sullivan introduced no evidence at trial that he had suffered monetary losses from the falsehoods, possibly because only 394 copies of the *Times* edition containing the ad had been sold in Alabama—thirty-five total in Montgomery.[1458] It made no difference under Alabama law, which allowed recovery of "presumed" "general" damages that could be calculated as the jury

1447. *Id.*
1448. *Id.* at 256–59.
1449. *Id.* at 259.
1450. *Id.*
1451. *Id.*
1452. *Id.* at 257.
1453. *Id.* at 259.
1454. *Id.*
1455. *Id.* at 258–59.
1456. New York Times Co. v. Sullivan, 144 So. 2d 25, 47 (Ala. 1962).
1457. *Id.* at 28.
1458. New York Times Co. v. Sullivan, 376 U.S. 254, 260 (1964).

saw fit.[1459] Punitive damages also could be awarded in that state on a showing of actual malice by the libeler, which meant something more egregious than "mere negligence or carelessness,"[1460] but not necessarily an actual intent to harm or even recklessness on the defendants' part.[1461] Alabama's highest court affirmed the verdict, finding that malice could be inferred against the *Times* because it possessed information in its own files proving the ad's falsehoods.[1462] Nor was the amount of the award objectionable, because in Alabama "[t]here is no legal measure of damages in cases of this character."[1463]

In overturning the Alabama judgment, Justice Brennan's opinion discarded the traditional rule that defamation was utterly unprotected by the First Amendment.[1464] That aspect of *Sullivan* will be considered in more detail later. For now, the important aspect of the case is its repudiation of the concept of seditious libel. Referring to the Sedition Act of 1798, Justice Brennan observed that while it "was never tested in this Court, the attack upon its validity has carried the day in the court of history."[1465] Citing Jefferson's pardoning of those convicted under it, dissenting opinions from Holmes, Brandeis and Jackson, along with two commentators, Justice Brennan concluded that "[t]hese views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[1466] In effect, Alabama had resurrected the Sedition Act, by approving a huge libel judgment that was based on assertions about official suppression of civil rights activism. Nowhere in the ad was there "even an oblique reference" to Sullivan.[1467] Brennan rejected the idea "that an otherwise impersonal attack on governmental operations [could be punished under the guise of] a libel of an official responsible for those operations."[1468] It could not, because "'prosecutions for libel on

1459. *Id.* at 262.
1460. *Id.*
1461. *Id.*
1462. *Id.* at 286.
1463. *Id.* at 264 (quoting New York Times Co. v. Sullivan, 144 So. 2d 25, 50 (Ala. 1962)).
1464. *See id.* at 270–72 (describing the history of judicial refusal to recognize certain First Amendment guarantees).
1465. *Id.* at 276.
1466. *Id.*
1467. *Id.* at 289.
1468. *Id.* (alteration in original).

government have [no] place in the American system of jurisprudence.'"[1469] During the Court's next term, *Sullivan* was extended to criminal libel prosecutions, requiring proof of actual malice to sustain a conviction for criticism of a public official.[1470]

Sullivan offers an appropriate coda to this discussion of free speech during the second Red scare. Brennan took it as an occasion to extol the value of "'the opportunity for free political discussion'"[1471] to democratic government, and quoted Brandeis' concurring opinion in *Whitney* on the importance of unrestrained discussion about public affairs.[1472] "Thus," Brennan concluded, "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[1473]

Brennan was writing in 1964, and by then the arena for free speech debates had shifted to another great struggle, the fight against Jim Crow in the South, soon to be followed by the controversy surrounding America's escalating involvement in Vietnam. *New York Times v. Sullivan* was decided as images of nonviolent demonstrations being beaten and jailed in Birmingham flickered across the nation's TV screens. By then, the Court had considerably modified *Dennis* to lower the risk that criticism of government could be taken as subversive advocacy. Free speech came at a price, whether to society or individuals, and that cost had to be weighed against the benefits of unbridled expression. But now the die was cast for "uninhibited, robust, and wide-open"[1474] clashes of opinions about public affairs.

V. AFFIRMING THE RIGHT TO PUBLIC PROTEST: FREE EXPRESSION DURING THE CIVIL RIGHTS ERA AND THE VIETNAM WAR

So far in relating the story of the First Amendment in the twentieth century, we have focused largely on cases dealing with

1469. *Id.* at 291 (quoting City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)).
1470. *See* Garrison v. Louisiana, 379 U.S. 64, 67 (1964) (holding that *Sullivan* applied to cases of criminal libel).
1471. *Id.* at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).
1472. *Id.* at 269–70.
1473. *Id.* at 270.
1474. *Id.*

one form or another of "subversive speech," the major exception being *New York Times v. Sullivan*. These were the types of cases that produced the foundation of free speech law during more than half the twentieth century. From the beginning of the 1960s to the early 1970s, the Court's attention shifted to a host of issues that arising from prosecutions of civil rights and anti-Vietnam War protesters. A large percentage of the First Amendment decisions on free expression that arose from these two nearly simultaneous struggles involved public protests that were suppressed because the authorities claimed some serious harm would flow from permitting the demonstrations. By the end of the period, the Court's constitutional handiwork had established a broad right of the populace to demonstrate in public places, despite the extraordinary offense that the protesters gave to defenders of the status quo, and notwithstanding the possibility that violence could erupt from the clash of opinions on the streets. To accomplish this, the Court polished up rulings from earlier decades and made aggressive use of the doctrines of vagueness and overbreadth.

Never forget as you read about the constitutional doctrines that unfolded and morphed in these years that they were among the most tumultuous times for the United States as a society. The 1960s and early 1970s stand as one of the major transitional periods of the nation. Americans born after 1960, which is most of the U.S. population, often think of those years as having something dimly to do with hippies and Vietnam, and a genre of music called Golden Oldies. While it is difficult to define the essence of the change, its profundity goes well beyond youthful rejection of mainstream society. Americans began the long and painful process of fundamentally altering rigid social, religious, racial, ethnic, gender, and political hierarchies, a process that continues today. Along with that, expression was amplified by the power of mass media—especially television—which combined with the commercial market for information and produced a powerful vehicle for broad cultural change. The medium was proclaimed to be the message—an oversold concept to be sure, yet with the oversize kernel of truth that what is said may be profoundly shaped by the form in which it is transmitted. Few images were more powerful in influencing the national attitudes than the pictures and film broadcast nationally of civil rights demonstrators in Birmingham during April-May 1963. It took a hardened heart not to be offended by nonviolent protesters being slammed against walls from the force of fire hoses, set upon

with police dogs and clubbed by baton-wielding cops, all under the direction of Birmingham's overtly racist police chief, T. Eugene "Bull" Connor. Whatever else, this was not the way of the future if the South wished to become a modern society, a reality that people North and South perceived with varying degrees of quickness. Vietnam was a variation on this phenomenon. Graphic color photos of gravely wounded soldiers and stacks of body bags became routine features of nightly news broadcasts, as were the scenes of enormous protest rallies at home.

Nonviolence was the watchword of the civil rights movement, as it was for most anti-Vietnam activists. A central tactic of many civil rights and anti-war protesters throughout more than a decade of agitation was the sit-in. Dissidents would assemble in some place that was a symbol of their remonstrance, such as a segregated lunch counter or bus station, and remain there passively until arrested. At times the immediate objective was to fill the jails to capacity, which took a page from the IWW's game plan some sixty years earlier. "If cursed, do not curse back. If pushed, do not push back. If struck, do not strike back, but evidence love and goodwill at all times."[1475] That advice came from the Montgomery Improvement Association, signed by its president, Rev. Martin Luther King, Jr., on the occasion of the successful boycott of the city's buses in 1956. Lamentably, wholesale rioting eventually erupted in key American cities as a consequence of impatience with the pace of change and the seeming intractability of the Vietnam War. Those kinds of uprisings, such as the Los Angeles riots of 1965, produced few serious free speech issues. Nonviolent protests did, in legions. By demonstrating nonviolently, the followers of Rev. King and other leaders of the cause gave authorities few plausible excuses for breaking up demonstrations. Frequently, nonviolent protesters were charged with the common law crimes of "breach of the peace," "disorderly conduct," or refusal to obey a police officer's order to leave a protest area. These laws, invariably vague, overbroad and applied with a discriminating eye by officials, were easy opening targets for members of the Court sympathetic with either the causes advocated or with the idea that a wide scope should be given to public protest. They were easy targets, however,

1475. Montgomery Improvement Association, "Integrated Bus Suggestions" (flyer), Dec. 19, 1956 (original copy located in Inez Jessie Baskin Papers, Alabama Department of Archives and History, Montgomery, Alabama).

because the doctrinal bases for overturning the actions of Southern authorities had been established a generation earlier.

Our investigation starts with two cases in the 1961 Term of the Court, each involving Louisiana's law against "disturbing the peace." *Garner v. Louisiana*,[1476] decided in 1961, reversed convictions arising out of three separate incidents. In each one, black students from Southern University in Baton Rouge were convicted for refusing to leave whites-only lunch counters in stores and a bus station. Louisiana courts had interpreted the statute to require proof that the defendants engaged in "outwardly boisterous or unruly conduct,"[1477] or that the arrest was necessary "to prevent an imminent public commotion."[1478] Reversing all of the judgments, Chief Justice Warren's majority opinion determined that "the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment."[1479] All of the protesters were studiously well behaved. In one of the cases, typical of the others, Warren noted that the demonstrators "not only made no speeches, they did not even speak to anyone except to order food; they carried no placards, and did nothing, beyond their mere presence at the lunch counter, to attract attention to themselves or to others."[1480] A few months later, the Court similarly overturned the convictions of four blacks who had the audacity to enter the whites-only waiting area of the bus depot in Shreveport, Louisiana, for the purpose of taking a trip to Mississippi.[1481] They had been arrested for disturbing the peace after refusing to leave on orders of the police.[1482] For good measure, the police arrested two other blacks in a car outside who had brought the other four to the station.[1483] "There was no evidence of violence. The record shows that the petitioners were quiet, orderly, and polite."[1484] The trial judge had found, however, "that the mere presence of Negroes in a white waiting room was likely to give rise to a breach of the

1476. 368 U.S. 157 (1961).
1477. *Id.* at 169.
1478. *Id.*
1479. *Id.* at 163.
1480. *Id.* at 170.
1481. Taylor v. Louisiana, 370 U.S. 154 (1962).
1482. *Id.* at 155.
1483. *Id.*
1484. *Id.*

peace,"[1485] which unfortunately could have been true. But given that the Court had held previously that blacks possessed a federal right to travel interstate using desegregated facilities, "violating a custom that segregated people in waiting rooms according to their race" could not be the basis for a conviction.[1486] Implicitly, the Court also suggested that the simple possibility of an adverse reaction by racists was not enough to justify demanding that a person leave a place where they are lawfully entitled to be.

Technically, these were not First Amendment decisions; rather, they relied on theory that the Due Process Clause did not tolerate penalizing individuals when there was no proof whatsoever that they had violated the law in question. Nonetheless, the implications for free expression were evident, just as they had been when the Court used the same technique in *Fiske v. Kansas*.[1487] And the Court well understood the relation, as evidenced by a 1965 decision, *Shuttlesworth v. Birmingham*,[1488] in which the Rev. Fred Shuttlesworth was convicted for doing nothing more than standing on the sidewalk in front of a department store. Shuttlesworth, a fiery Baptist minister and one of the founders of the Southern Christian Leadership Conference (SCLC), was "notorious," as the arresting officer testified, for being one of the most important and fearless leaders of the civil rights movement.[1489] He was arrested countless times, beaten savagely by police, fire hosed, and his home was bombed repeatedly.[1490] Before the decade of the '60s ended, the reverend would be convicted dozens of times for defying segregation in general and Bull Connor in particular;[1491] his name appeared regularly in the captions of the Court's cases (among others, he was a defendant in *New York Times v. Sullivan*). One gets the impression, though, that this time even Shuttlesworth was dumbfounded by the order of a policeman to "clear the sidewalk and not obstruct it for the pedestrians."[1492] Originally he had been

1485. *Id.*
1486. *Id.* at 156.
1487. 274 U.S. 380 (1927)
1488. 382 U.S. 87 (1965).
1489. *Id.* at 102.
1490. David B. Oppenheimer, *Kennedy, King, Shuttlesworth, and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 650–55 (1995).
1491. *Id. See also* ANDREW M. MANIS, A FIRE YOU CAN'T PUT OUT: THE CIVIL RIGHTS LIFE OF BIRMINGHAM'S REVEREND FRED SHUTTLESWORTH 34, 181, 233, 272, 274, 279, 308, 350, 357, 433–34 (1999).
1492. *Shuttlesworth*, 382 U.S. at 89.

with ten to twelve other African-Americans, but the rest dispersed on the officer's order, leaving Shuttlesworth standing alone.[1493] "You mean to say we can't stand here on the sidewalk?"[1494] he asked incredulously, just before being lead off to jail and a sentence of six months "at hard labor."[1495]

Reversing Shuttlesworth's conviction, Justice Stewart wrote that "[t]here was thus no evidence whatever in the record to support the petitioner's conviction under this ordinance."[1496] Shuttlesworth's victory also determined that a portion of the statute under which he was convicted was fatally defective. As it was written, a "person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. [W]ith its ever-present potential for arbitrarily suppressing First Amendment liberties, [the] law bears the hallmark of a police state."[1497] In fact, as Justice Abe Fortas' concurrence highlighted, the official explanation for the arrest was a "facade," a pure "fiction."[1498] Everyone in Birmingham knew that Shuttlesworth was leading an ongoing boycott of the city's stores that discriminated against blacks.[1499] "Shuttlesworth's walk on April 4, 1962, started during a recess in a federal court civil rights trial in which he was involved," Fortas related.[1500] "The trial had been publicized."[1501]

Other decisions during that fateful decade used the same technique of overturning convictions on the basis that civil rights protesters had done nothing wrong other than confront the tradition of segregation by insisting on the same rights as whites. A 1963 case, *Wright v. Georgia*, reversed the convictions of six young black men whose crime consisted of "peacefully playing basketball in a public park in Savannah, Georgia, on the early afternoon of Monday, January 23, 1961."[1502] They were shooting hoops at a park reserved for whites, and the group was arrested after declining to obey a police officer's order to leave.[1503] As the arresting officer

1493. *Id.*
1494. *Id.*
1495. *Id.* at 88.
1496. *Id.* at 95.
1497. *Id.* at 90–91.
1498. *Id.* at 101 (Fortas, J., concurring).
1499. *Id.* at 101–02.
1500. *Id.* at n.4.
1501. *Id.*
1502. 373 U.S. 284, 285 (1963).
1503. *Id.* at 285–86.

admitted, "they wasn't [*sic*] disturbing anything," but he arrested them anyway: first, "because they were negroes,"[1504] and second, "to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people."[1505] Chief Justice Warren methodically shredded these excuses. To begin, segregated public parks were unconstitutional, so the race of the defendants could not be a basis for the arrests.[1506] Since they had a right to be on the basketball courts, they could ignore the officer's order to move on: "Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."[1507] Regarding the fear of confrontation with whites, there was no evidence of any trouble brewing—the number of cars traveling nearby was the normal traffic pattern.[1508] Finally, "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present."[1509]

Warren employed this otherwise simple case, one not involving free expression (unless basketball counts as such) to establish two central propositions that would be important for First Amendment cases involving civil rights protesters. One was that a person could ignore an unlawful order from a police officer. Police had no constitutional authority to order people to leave a public place that they were using consistent with its purpose. A second, and much more complex assertion, was that the mere "possibility of disorder"[1510] could not justify an arrest. This left open some hard questions for later cases to resolve. Would the situation be different if a confrontation with whites occurred, even if the protesters were themselves entirely nonviolent and uttered no "fighting words"? What if a riot was about to occur and the police could not contain the crowd—can they arrest a small number of protesters provoking the mob? These beguiling questions, we shall see, would be before the Court time and again throughout the 1960s and beyond.

1504. *Id.* at 286.
1505. *Id.* at 292.
1506. *Id. See also* Shuttlesworth v. Birmingham, 382 U.S. 87, 89 (1965).
1507. *Wright*, 373 U.S. at 291–92; *see also Shuttlesworth,* 382 U.S. at 91.
1508. *Wright*, 373 U.S. at 292–93.
1509. *Id.* at 293.
1510. *Id.*

In late February 1963, the Court issued its first important First Amendment decision arising from the Southern civil rights protests. *Edwards v. South Carolina*[1511] arose from a rally at the state capitol in 1961. Several hundred people poured out of the Zion Baptist Church in Columbia and marched to the South Carolina State House. Their purpose was to demonstrate and present a remonstrance against segregation "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina."[1512] Initially, police permitted them to enter the capitol grounds, which were open to the public, where they marched one or two abreast carrying signs "bearing such messages as 'I am proud to be a Negro' and 'Down with segregation,'"[1513] and "'You may jail our bodies but not our souls.'"[1514] Police officials later admitted that the marchers were never disorderly; they were "well demeaned" and even "well dressed."[1515] No traffic, either vehicular or pedestrian, was obstructed.[1516] Two or three hundred onlookers watched the procession, but there was "no evidence at all of any threatening remarks, hostile gestures, or offensive language on the part of any member of the crowd."[1517] In any event, the police acknowledged that there was "ample" police protection present to control any confrontation, had one occurred, which it had not.[1518] After a half hour or more, police ordered the marchers to leave within fifteen minutes or face arrest.[1519] One of the group's leaders responded with a "religious harangue," as the City Manager termed it, and the remainder began "loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands."[1520] After fifteen minutes passed, they all were arrested and jailed on charges of breach of the peace.[1521] Eventually, sentences "ranging from "a $10 fine or five days in jail, to a $100 fine or 30 days in jail" were handed out to all.[1522]

1511. 372 U.S. 229 (1963).
1512. *Id.* at 230.
1513. *Id.* at 231.
1514. *Id.* at 240 (Clark, J., dissenting).
1515. *Id.* at n.3 (majority opinion).
1516. *Id.* at 231–32.
1517. *Id.* at 231.
1518. *Id.* at n.7.
1519. *Id.* at 233.
1520. *Id.*
1521. *Id.*
1522. *Id.* at 234.

Overturning every conviction, Justice Stewart's nearly unanimous opinion eschewed reliance on the "no evidence" approach of earlier cases, despite the fact that the state agreed the demonstrators were orderly, which made it hard to understand how they could be convicted had state law been applied properly. Instead, he went straight to the heart of the First Amendment, which did "not permit a State to make criminal the peaceful expression of unpopular views."[1523] Rather than relying on the conclusions of the South Carolina courts, Justice Stewart conducted an "independent examination of the whole record,"[1524] before concluding that the peaceful assembly was a "far cry from the situation in *Feiner v. New York*,"[1525] the 1951 case in which a Socialist speaker was convicted of disorderly conduct because (as Stewart described the facts) he had incited a crowd to near riot.[1526] The divergence of the facts from *Feiner* thus presented a stark question of whether the citizenry had the right to assemble at their state capitol and protest. "The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form," Stewart wrote, emphasizing that "[t]hey peaceably assembled at the site of the State Government and there peaceably expressed their grievances 'to the citizens of South Carolina, along with the Legislative Bodies of South Carolina.'"[1527] Stewart reached back to a statement from Chief Justice Hughes in *Stromberg,* where the Chief Justice extolled the indispensability of "the opportunity for free political discussion" to democracy and maintenance of the rule of law.[1528] It made no difference that people were offended by what was said. Quoting Justice Douglas' *Terminiello* opinion, Stewart admonished that freedom of speech was intended to "invite dispute," and "may indeed best serve its high purpose" by provoking "a condition of unrest," "dissatisfaction with conditions as they are," or "even . . . anger."[1529] "Speech," Douglas had written and Stewart now quoted, "is often provocative and challenging."[1530] Still left unresolved, however, was the

1523. *Id.* at 237.
1524. *Id.* at 235.
1525. *Id.* at 236.
1526. *Id.*
1527. *Id.* at 235.
1528. *Id.* at 238 (quoting Stromberg v. Cal., 283 U.S. 359, 369 (1931)).
1529. *Id.* at 237 (quoting Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949)).
1530. *Id.*

definition of the line between merely offensive speech (protected) and "incitement to riot" (unprotected).[1531]

An "independent examination"[1532] of the record was one of the hallmarks of strict scrutiny—it prevented states from hiding behind usually unreviewable fact finding by trial courts. With civil rights protests, the Court would sometimes view films of the events and decide for themselves in a kind of official judicial instant replay. That happened in *Cox v. Louisiana*,[1533] a 1965 decision that reviewed a protest organized by the Congress of Racial Equality (CORE) in Baton Rouge on December 14, 1961. The target of the demonstration, as authorities knew in advance, was the courthouse where twenty-three of the demonstrators' classmates had been jailed the day before for picketing stores with segregated lunch counters.[1534] Up to two thousand students from the traditionally black Southern University walked in the rain five miles from campus to the old state capitol (police had arrested their bus drivers—a nice touch), and then proceeded the few blocks to the courthouse, taking care to occupy only half the sidewalk.[1535]

Cox wound up assuming charge of the demonstration by default because all the other CORE leaders had been arrested. He paced along the line of marchers, communicating with police, urging the marchers to remain orderly and turn the other cheek if attacked, "that if anyone spit on them, they would not spit back on the person that did it."[1536] At the courthouse, the police first told them to go back "whence they came," but then the chief of police instructed Cox to confine the protest to one side of the courthouse, which he did.[1537] Some pulled out protest signs from under their coats, sang patriotic and freedom songs, pledged allegiance to the flag, prayed, clapped and listened to a speech.[1538] From inside the jail, their incarcerated compatriots could be heard singing in response, which the crowd "greeted with cheers and applause."[1539] Up to this point, everyone was "perfectly orderly," save for some

1531. *See also* Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964) (per curiam) (reversing, on authority of *Edwards*, convictions for refusing to end a "peaceful, orderly fashion in front of the City Hall to protest segregation").
1532. *Edwards*, 372 U.S. at 235.
1533. 379 U.S. 536 (1965).
1534. *Id.* at 538.
1535. *Id.* at 539.
1536. *Id.* at 542.
1537. *Id.* at 540.
1538. *Id.* at 542.
1539. *Id.*

grumblers and mutterers in a crowd of several hundred whites that gathered nearby.[1540] Trouble started when Cox announced, "All right. It's lunch time. Let's go eat."[1541] He urged the crowd to fan out and seek service at segregated lunch counters throughout the downtown. The police chief got very upset, picked up a microphone, declared them to be disturbing the peace and ordered everyone to disperse "immediately," which they had been about to do anyway.[1542] Moments later the demonstrators were routed by tear-gas and advancing police.[1543] None of them was arrested that day.[1544] But on the next day, Cox was taken into custody and later convicted of "disturbing the peace, obstructing public passages, and picketing before a courthouse."[1545] He received a total of one year and nine months in jail.[1546]

Justice Goldberg wrote the opinion for the Court overturning Cox's convictions.[1547] Turning first to the breach of the peace charge, he found the facts to be constitutionally indistinguishable from *Edwards*—"our independent examination of the record . . . shows no conduct which the State had a right to prohibit as a breach of the peace."[1548] Watching the events caught by the camera "reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout."[1549] Never were they "hostile, aggressive, or unfriendly."[1550] Even the police conceded that it was only when Cox announced, "Let's go eat," that they sensed trouble, the source of which was the white crowd of 100 to 300 who were separated from the students by seventy-five to eighty armed police.[1551] The onlookers may have grumbled and jeered, but no one "threatened violence."[1552] That was enough to reverse the convictions as violations of the First Amendment, but Goldberg took the unusual step of voiding the entire breach of the peace statute because it was "unconstitutionally vague in its overly broad

1540. *Id.* at 546 (internal quote omitted).
1541. *Id.* at 542.
1542. *Id.* at 543.
1543. *Id.* at 544.
1544. *Id.*
1545. *Id.* at 538.
1546. *Id.*
1547. *Id.*
1548. *Id.* at 545. The Justices had viewed the news film. *Id.*
1549. *Id.* at 547.
1550. *Id.*
1551. *Id.* at 543.
1552. *Id.* at 550.

scope."[1553] As interpreted by the Louisiana courts, the law made it illegal "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet."[1554] That definition permitted "persons to be punished merely for peacefully expressing unpopular views,"[1555] for as *Terminiello* had held, creating unrest was a "high purpose" of the First Amendment.[1556]

Cox also was convicted of obstructing a public sidewalk, which admittedly the students had done under his overall direction. Local authorities had every right to keep public ways open, and free speech did "not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."[1557] For example, "[a] group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."[1558] Still, a law regulating demonstrations in public places must be applied in a "uniform, consistent, and nondiscriminatory" fashion and it had not been in Baton Rouge.[1559] "City officials who testified for the State clearly indicated that certain meetings and parades are permitted in Baton Rouge, even though they have the effect of obstructing traffic, provided prior approval is obtained."[1560] No standards had been set by the law to guide authorities in permitting public demonstrations, leaving them with "completely uncontrolled discretion,"[1561] the same vice that doomed Mayor Hague's scheme for maintaining his dominance in Jersey City.[1562] Laws of that sort posed an "obvious danger to the right of a person or group not to be denied equal protection of the laws."[1563]

Finally, Goldberg dispatched Cox's conviction for violating a statute against "pickets or parades in or near a building housing a

1553. *Id.* at 551.
1554. *Id.*
1555. *Id.*
1556. *Id.* (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)). Later cases held that if a party wins an as-applied challenge to a statute on First Amendment grounds, then that person cannot also make a facial attack on the law. *See* Brockett v. Spokane Arcades, 472 U.S. 491, 501–04 (1985).
1557. *Id.* at 554.
1558. *Id.* at 555.
1559. *Id.*
1560. *Id.*
1561. *Id.* at 557.
1562. Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).
1563. *Cox,* 379 U.S. at 557.

court."[1564] To be guilty under state law, a person must have intended to obstruct the business of the court or try to influence judges, juries, witnesses and officials inside.[1565] On its face, the law was unobjectionable, as it was "a precise, narrowly drawn regulatory statute which proscribes certain specific behavior,"[1566] thereby serving the important end of assuring the impartial administration of justice. By contrast with *Bridges v. California*,[1567] in which the Court had overturned contempt sanctions for "the mere publication of a newspaper editorial or a telegram to a Secretary of Labor," according to *Cox,* demonstrations outside courthouses may be "prohibited by a legislative determination based on experience that such conduct inherently threatens the judicial process."[1568] What saved Cox was the fact that "the highest police officials in the city" had "affirmatively told" him that the demonstrators could convene across the street from the courthouse.[1569] "In effect," Goldberg concluded, Cox "was advised that a demonstration at the place it was held would not be one 'near' the courthouse within the terms of the statute."[1570] When the crowd was ordered to disperse, the reason was not their proximity to the courthouse, but what the police chief regarded as the inflammatory nature of Cox's admonition to head for lunch at segregated establishments. Just as demonstrators may be obliged to confine their protests to "a proper time and place," there was an "equally plain requirement" that citizens receive "fair warning as to what is illegal; for regulation of conduct that involves freedom of speech and assembly not to be so broad in scope as to stifle First Amendment freedoms, which 'need breathing space to survive.'"[1571]

Goldberg pulled out most of the pro-free speech themes that had developed since the 1930s to craft his opinion. People possessed a right to carry out peaceful public demonstrations, particularly at seats of power. Their protests could be regulated, to account for public needs such as traffic control or administration of justice, but any such controls had to be applied evenly according to objective standards. These must be "precise, narrowly drawn"

1564. *Id.* at n.4.
1565. *Id.*
1566. *Id.* at 559, 562.
1567. 314 U.S. 252 (1941).
1568. *Cox*, 379 U.S. at 559, 566.
1569. *Id.* at 571.
1570. *Id.*
1571. *Id.* at 574 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

rules that left no discretion on the part of officials.[1572] Vague and overbroad statutes or rules were unconstitutional in their entirety—on their face, that is. Fair notice must precede arrest. One could ignore an invalid order by police to "move on" or "disperse."[1573]

But there were limits to public demonstrations, still mostly ill defined, that could be imposed by narrowly drawn laws aimed at maintaining public order. In 1966, the Court in *Adderley v. Florida*[1574] upheld the convictions of civil rights protesters blocking access to a courthouse/jail service entrance, in violation of a specific law to the contrary. "The State, no less than a private owner of property," Justice Black wrote, "has power to preserve the property under its control for the use to which it is lawfully dedicated."[1575] States quickly passed laws to ban specific conduct, such as picketing near courthouses and other public buildings, and they fine-tuned their ordinances to preclude facial attack. Mississippi, for example, enacted an anti-picketing statute on April 8, 1964 that banned "picketing or mass demonstrations" so as to "obstruct or unreasonably interfere" with entrances to public buildings and their normal public functions, as well as block sidewalks and streets.[1576] As written, this law was neither overbroad nor excessively vague, the Court found in 1968. Justice Brennan's opinion for the Court in *Cameron v. Johnson* upheld the statute despite evidence that the law was passed specifically to end picketing in connection with a months-long voter registration drive in Hattiesburg.[1577] Justice Fortas' dissent gave a telling account:

> The law was signed by the Governor on the same day it was passed by the State Legislature, and delivered by messenger to waiting law enforcement officials in Hattiesburg on the following day. As soon as the law was brought to those officials on April 9, they read it aloud to the pickets and asked them to disperse.[1578]

1572. *Id.* at 562.
1573. *Id.* *See also* Shuttlesworth v. Birmingham, 394 U.S. 147, 150 (1969) (invalidating parade ordinance that gave officials "virtually unbridled and absolute power").
1574. 385 U.S. 39 (1966).
1575. *Id.* at 47.
1576. Cameron v. Johnson, 390 U.S. 611, 612 n.1 (1968) (quoting MISS. CODE ANN. § 2318.5 (Supp. 1966)).
1577. *Id.* at 613.
1578. *Id.* at 625 (Fortas, J., dissenting).

Regardless, Brennan answered, it was "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society,"[1579] and there was no evidence in the record that the law had been applied "in bad faith."[1580]

Defining the circumstances in which a person was entitled to protest under this formulation depended on the validity of the state's interest in preventing the demonstration. Not every asserted state interest would be sufficient to override the right to speak. Certainly the government could not do so because of the speaker's race or disagreement with the message. Furthermore, the authorities could not quarantine every public place against protesters. These points had been established a generation earlier when Justice Roberts wrote that the "streets are natural and proper places for the dissemination of information and opinion."[1581] Preventing littering, unquestionably a legitimate state interest, must give way to the right to pass out handbills. Door-to-door canvassers could not be prohibited, despite the predictable annoyance they will cause to the public. Where was the line between those government interests sufficient to suppress speech and ones that were not heavy enough to tip the balance? One clue to how this question would eventually be answered was the Court's identification of the normal and legitimate uses of public property, which in turn defined the limits of state controls.[1582] A normal use could be for speeches and protests, at least part of the time. Streets may be thoroughfares for vehicles, but they also are traditional places for demonstrations, and the authorities *must* afford access under reasonable guidelines. Eventually the Court would expand the list of these constitutionally "quintessential" public forums to include public squares and parks, which have purposes other then providing venues for political rallies; they have been places where public speaking has occurred "by long tradition."[1583] *Hague* had determined that these places were public commons, "immemorially . . . held in trust" for the people to use for communication.[1584]

1579. *Id.* at 617 (majority opinion) (quoting Cox v. Louisiana, 379 U.S. 536, 564 (1965)).

1580. *Id.* at 620.

1581. Schneider v. State, 308 U.S. 147, 163 (1939).

1582. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (compiling the Court's First Amendment public property precedents active at that time).

1583. *Id.*

1584. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939). In *Brown v.*

There are other legitimate public interests that justify restricting speech beyond limits on the time, place, and manner of demonstrations. Some crimes or illegal acts are carried out entirely by words and are unprotected because they independently constitute crimes (passing a stick-up note to a bank teller or engaging in sexual harassment in the workplace). People are not free to break otherwise valid laws, such as these, by claiming they are engaged in an expressive activity, not even to advance a political end. The First Amendment does not protect civil disobedience.[1585] One cannot trespass on private property, rob banks or explode bombs to publicize a cause, however compelling. Were this not clear before the 1960s, it certainly was after the Court decided *United States v. O'Brien*[1586] in 1968. A little over two years earlier, David Paul O'Brien and three other men burned their draft cards on the steps of the South Boston Courthouse.[1587] They promptly were assailed by the crowd, which was thwarted in pummeling the draft resisters by FBI agents who "ushered" the four into the courthouse.[1588] (Sometimes it's handy to have the FBI shadowing you.) They then arrested O'Brien.[1589] He was convicted under an amendment to the Selective Service Act that made it a crime to knowingly destroy or mutilate a draft card.[1590]

O'Brien raised two different defenses. First, he claimed to have been engaged in "symbolic speech" worthy of First Amendment protection.[1591] He argued that the card served no

Louisiana, the Court reversed convictions for a silent protest by six African-Americans in a segregated library. Brown v. Louisiana, 383 U.S. 131, 143 (1966). Only Justice Fortas' three-member plurality, however, squarely held that the library was an appropriate venue for the protestors to stand "as monuments of protest against the segregation of the library." *Id.* at 139 (Fortas, J., plurality). Justice White's concurrence rested on the ground that the protest "did not depart significantly from what normal library use would contemplate." *Id.* at 151 (White J., concurring). Justice Brennan avoided the issue by finding the breach of the peace law—the same one involved in *Cox v. Louisiana*—to be unconstitutionally overbroad. *See id.* at 143–44 (Brennan, J., concurring); *see also* Cox v. Louisiana, 379 U.S. 536 (1965).

1585. New York v. Ferber, 458 U.S. 747, 761–62 (1982) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (stating that the First Amendment does not extend to "speech or writing used as an integral part of conduct in violation of a valid criminal statute")).

1586. 391 U.S. 367 (1968).

1587. *Id.* at 369.

1588. *Id.*

1589. *Id.*

1590. *Id.* at 370.

1591. *Id.* at 376.

purpose once the information it contained was conveyed to the registrant (his draft number, classification, etc.).[1592] Second, Congress apparently had enacted the law specifically to deal with the wave of draft card burning protests against the war.[1593] Thus, the motive of the statute, he alleged, was to suppress a specific mode of demonstration against the conflict.[1594]

Chief Justice Warren's opinion for the Court resoundingly rejected both of O'Brien's arguments.[1595] Only Justice Douglas dissented, as he wanted to set the case for re-argument on the question of the constitutionality of drafting men to serve in an undeclared war.[1596] Chief Justice Warren opened his opinion by grudgingly assuming for purposes of argument that O'Brien's actions had a "communicative element . . . sufficient to bring into play the First Amendment."[1597] Yet he had already undermined the possibility in the previous sentence: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[1598] This was obvious and thus unhelpful. Conduct, such as raising a red flag, picketing, marching, assembling or just standing, had long been recognized to have First Amendment value.[1599] What was different about putting a match to small pieces of paper about two-by-three inches in size? Chief Justice Warren's answer emphasized that the government had a legitimate reason—unrelated to suppressing speech—to deter the "wanton and unrestrained destruction" of draft cards.[1600]

To reach this conclusion, the Chief Justice noted that "'speech' and 'nonspeech' elements" might be present "in the same course of conduct."[1601] If there is "a sufficiently important governmental interest in regulating the nonspeech element," then "incidental limitations on First Amendment freedoms" may be

1592. *Id.* at 378.
1593. *Id.* at 380.
1594. *Id.* at 376.
1595. *See id.* at 367–386.
1596. *Id.* at 389–91 (Douglas, J., dissenting).
1597. *Id.* at 376.
1598. *Id.*
1599. *See* James M. McGoldrick, United States v. O'Brien *Revisited: Of Burning Things, Waving Things, And G-Strings*, 36 U. MEM. L. REV. 903, 907–909 (2006) (cataloguing the history of protected conduct prior to *O'Brien*).
1600. *O'Brien*, 391 U.S. at 380.
1601. *Id.* at 376.

tolerated.[1602] He then converted that conclusion into a formula that would thereafter be known as the "*O'Brien* test":

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[1603]

Warren offered no precedent for this conclusion. As is often the case, multi-factor tests like this one leave many details to be resolved. To interpret this constitutional codification, the Court eventually would have to elucidate what it meant by the phrases "important or substantial," "unrelated to the suppression of free expression," and "no greater than essential."[1604]

Warren cited all sorts of reasons to show why the government might reasonably want to prevent deliberate destruction of draft cards.[1605] They served various purposes, such as reminding the man of his classification, registration number, the address of his draft board, and warning him to advise the board if he moved.[1606] O'Brien tried to dodge those arguments by pointing out that the law was unnecessary to serve these purposes, as Selective Service regulations already required constant "personal possession" of one's draft card.[1607] Warren was unimpressed. These were separate offenses, with different elements. Congress could not have come up with a more precise method to "assure the continuing availability of issued Selective Service certificates" than by passing "a law which prohibits their willful mutilation or destruction."[1608] Warren's reasoning here seems suspiciously circular. Once he concluded that Congress' purpose was to stop intentional mutilation of draft cards, it logically followed that the statute served precisely that purpose. But that begs the question: did Congress need to ban intentional destruction in order to assure personal possession, which was the ostensible goal? Congress surely could

1602. *Id.*
1603. *Id.* at 377.
1604. *Id.*
1605. *Id.* at 378–80.
1606. *Id.*
1607. *See id.* at 380–81.
1608. *Id.* at 381.

have passed a law mandating continuous possession, with the same penalties as for mutilation, along with a separate provision outlawing the destruction of another's draft card. A better explanation is one that Warren referred to only obliquely. Congress may have thought that intentional destruction was much more serious than merely failing to carry the card in one's wallet. Knowingly mutilating a draft card undermined legislative goals more than the possession requirement, since it encouraged others to do the same, thereby depriving them of the information the government wished them to have in their possession.[1609]

This last point takes us to the crux of *O'Brien*. Considerable naiveté would be needed to doubt that the motivating factor in Congress' action was dealing with draft card burners who were dramatizing their objections to the war. In addition to explicit statements made on the floor to this effect, the congressional committee reports "[made] clear a concern with the 'defiant' destruction of so-called 'draft cards' and with 'open' encouragement to others to destroy their cards . . . ."[1610] Warren dismissed these findings as proving nothing more than Congress' judgment "that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System."[1611] Again, this ignored the critical question: Did Congress think that the relatively few who torched their cards were likely to bring down the system? No, the worry was that others would be encouraged to defy the draft. Congress' real concern, then, was with the effect of the message communicated by O'Brien and others. That makes it seem much more like an incitement case akin to some of the World War I prosecutions.[1612] Whereas the Court usually demanded proof that the prohibited speech was likely to cause an imminent harm, and it would scrutinize the evidence to that effect, here Congress essentially received total deference. This resembled the supposedly repudiated methodology of *Gitlow* and *Whitney*—which deferred to legislative determinations that certain utterances or associations were "so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power."[1613]

1609. *Id.* at 385–86.
1610. *Id.*
1611. *Id.* at 386.
1612. *See* discussion pp. 828–877.
1613. Gitlow v. New York, 268 U.S. 652, 668 (1925).

The difference between *O'Brien* and cases such as *Gitlow* was that the Selective Service law did not proscribe specific words; instead, it "condemn[ed] only the independent noncommunicative impact of conduct within its reach . . . ."[1614] On its face, the law was neutral with respect to speech, and to the extent it discouraged communication, this was an "incidental" effect.[1615] Warren refused to question Congress' motives: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[1616] A major reason for this deference was the "hazardous" nature of an inquiry into the motives of a multi-member legislative body.[1617] "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it," and "the possibility of misreading Congress' purpose" was all too real.[1618] Besides, if the Court struck a speech-neutral law due to improper motives, Congress could simply re-enact it, accompanied by speeches that gave nothing but acceptable justifications for the law.

If that line of reasoning seems persuasive, contrast *O'Brien* with the Court's handling of facially neutral laws that have an adverse impact on minority groups. As we know, in order to attack such a law successfully, the complainant must show that it was passed "because of" a desire to harm the minority, and not merely that such was the inevitable consequence of the law.[1619] That necessarily involves piercing the legislative veil to prove that "a discriminatory purpose has been a motivating factor in the decision . . . ."[1620] Although this is an arduous burden, it can be accomplished. In *Hunter v. Underwood*,[1621] decided seven years after *O'Brien*, the Court (per Justice Rehnquist) invalidated an Alabama constitutional provision that disenfranchised people who committed crimes of "moral turpitude."[1622] Abundant evidence in the legislative record

1614. United States v. O'Brien, 391 U.S. 367, 382 (1966).
1615. *Id.* at 376–77.
1616. *Id.* at 383.
1617. *Id.*
1618. *Id.* at 384.
1619. McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (quoting Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).
1620. Vill. of Arlington Heights v. Metro. Dev. Corp., 429 U.S. 252, 265–66 (1977).
1621. 471 U.S. 222 (1985).
1622. *Id.* at 223.

proved that a major purpose of its enactment was to disenfranchise African-Americans, who tended to be convicted of crimes fitting Alabama's definition of moral turpitude (vagrancy, for example).[1623] Justice Rehnquist conceded that the law was facially neutral regarding race, but still it could not be applied neutrally because of its tainted origin.[1624] He flicked off the state's argument that despite its pernicious origins, the law validly identified an appropriate category of criminals not deserving the right to vote. "Without deciding whether [the law] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."[1625] Why wasn't O'Brien given the same right to question the motive of Congress? Rehnquist's opinion in *Hunter* actually quoted *O'Brien* on the hazards of discerning legislative intent, but dismissed concern because the state had "essentially conceded" that race was a motivating factor for enacting the "moral turpitude" exclusion.[1626]

In other cases decided after *O'Brien*, the Court ruled that public employees have a liberty interest in free speech. Nontenured employees could not be terminated or disciplined "in retaliation for his exercise of the constitutional right of free speech."[1627] Proving a retaliatory motive necessitates an inquiry into the intent of the persons who made the decision, which may involve figuring out the subjective motivations of a multi-member body such as a school board. In light of these later cases, *O'Brien* cannot be taken as completely precluding the invalidation of a facially neutral law whose passage was motivated by a desire to suppress speech. Likewise, a neutral law (say one authorizing the nonrenewal of teacher contracts) cannot be applied out of a desire to punish speech activities.[1628]

O'Brien left numerous questions open, but it did accomplish an important heuristic purpose by laying out a blueprint for analyzing speech cases in which the expression involves some kind of conduct. Either the regulation is related to expression (such as a

1623. *Id.* at 227.
1624. *Id.* at 231–33.
1625. *Id.* at 233.
1626. *Id.* at 228–30.
1627. Perry v. Sindermann, 408 U.S. 593, 598 (1972).
1628. *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 283–84 (1977).

ban on obscene movies or a requirement that one get a parade permit to demonstrate) or it is not, meaning that the purpose of the law has some other legitimate purpose aside from suppressing expression (for example, ordinary criminal laws, such as those against trespass, destruction of another's property or fraud). If the law does not target expression, it will pass review so long as the government's purpose is "important" and it is "no greater than essential." Through a series of rulings in the late 1960s and early 1970s, the Court addressed both of the situations just outlined: cases in which laws were related to expression and their opposite. By far, most of the decisions dealt with the former: statutes designed either to suppress certain forms of expression or channel speech through time, place, and manner rules. Many laws of this type were found unconstitutional. But with regard to statutes that on their face were unrelated to expression (the *O'Brien* situation), not once has the Court struck such a law on the ground that its "incidental" effect on speech exceeded constitutional bounds.[1629]

With regard to laws that do relate directly to expression, the public demonstrations during the 1960s and 1970s led the Court to enunciate a series of principles that have defined the modern approach to free expression. Most importantly, the Court refined and greatly limited the types of public interests that justified limiting speech on the grounds that its content presented an evil that overrode individual expression. One of the many questions addressed in these cases was the longstanding matter of defining

1629. Justice Antonin Scalia has questioned whether the test even makes sense when the law at issue is general in nature and does not target speech in any way. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring). Justice Scalia pointed out that "virtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition." *Id.* Why should the government need an "important" interest, or be obligated to use a means "no greater than essential" merely because someone employs prohibited conduct as a way to convey a message? *Id.* at 577. Support for Justice Scalia's point, even if it were accepted, would now be inconsequential in practice. Many cases have accepted essentially any legitimate government purpose as "important," and the "no greater than essential" prong has been watered down to the vanishing point by deferring to government authorities on the necessity for a measure targeting conduct that is not inherently expressive. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) ("We do not believe, however, that either United States v. O'Brien or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.").

the respective obligation of demonstrators to be orderly and the corresponding power of the police to break up a protest because opponents to it threatened violence. That would take the Court back to old questions, such as the limits of incitement to violence, and newer variations, as in flag burning and the public use of profanity.

The question of the police's duty to protect protesters from attack could have been answered in *Gregory v. City of Chicago*,[1630] decided in 1969. Dick Gregory, the black comedian and civil rights activist, led a march in 1965 of upwards of eighty-five protesters from the city hall in Chicago to Mayor Richard Daley's home, five miles away.[1631] Their purpose was to protest the slow pace of integration in the city's schools and to demand the removal of the school system's superintendent.[1632] Dozens of police accompanied the march and scores more joined the scene at Mayor Daley's house, where Gregory's group paraded around, singing and chanting.[1633] A crowd of angry whites grew larger as the evening wore on, eventually reaching more than a thousand.[1634] They hurled rocks, eggs and vile epithets at the demonstrators: "'God damned nigger, get the hell out of here;' 'Get out of here niggers—go back where you belong or we will get you out of here' and 'Get the hell out of here or we will break your blankety-blank head open.'"[1635] Gregory patrolled the lines of his marchers, admonishing them to keep moving, ignore the insults, and "above all means, do not hit them back."[1636] Throughout the tense evening, Gregory's people stuck to communicating their message. Eventually, the police commander on the scene advised Gregory that the situation was approaching a riot and asked him to allow the police to escort his marchers to safety.[1637] Gregory refused, along with most of the protesters, who were then arrested for disorderly conduct.[1638]

Gregory presented a perfect opportunity for the Court to set some boundary between the rights of otherwise law-abiding

1630. 394 U.S. 111 (1969).
1631. *Id.* at 126.
1632. *Id.* at 115.
1633. *Id.* at 126–27.
1634. *Id.* at 127–28.
1635. *Id.* at 128–29.
1636. *Id.* at 127.
1637. *Id.* at 129.
1638. *Id.* at 112.

protesters and their violence-prone opponents. Chief Justice Warren instead chose to take the "no evidence" route to reversal. "This is a simple case," Chief Justice Warren began his opinion.[1639] Gregory's group had been arrested for disorderly conduct, but there was absolutely no evidence that they were disorderly.[1640] Whereas Justice Goldberg in *Cox* had found the statute there both unconstitutional on its face and as applied, Warren stopped short of doing the same, which might have clarified the respective duties of police and besieged demonstrators. There was a "crying" need for a "narrowly drawn line," Justice Black lamented in his *Gregory* concurrence, but the Court has yet to provide one.[1641] It is a complex problem, and an answer that is consistent with the remainder of constitutional law is illusive. One solution, proposed by the Illinois Supreme Court in this case, was that the police must have exhausted "all reasonable efforts to protect the demonstrators" before arresting them.[1642] But what is a reasonable effort? Must the police risk their lives to guard a demonstration from a howling mob? Should the Chicago police have turned their tear gas and riot clubs against the counter-demonstrators? Did it matter that only some in the crowd were violent, while others were exercising their constitutional right to rebuke what they saw as an unjustified attack on the mayor? Did it matter that trying to break up the mob might unleash a deadly riot?

At a minimum, in protecting demonstrators from hostile opponents equal protection principles oblige the police to act consistently and without regard to the message of the protesters. As between rock-hurling rowdies and peaceful marchers, the prima facie responsibility of the police surely must be to nab the former, since the First Amendment does not allow the state to criminalize "the peaceful expression of unpopular views."[1643] Yet that only nicks the veneer of the problem, as it ignores the damage that can befall innocent bystanders and property owners near the scene of a violent clash. On the other hand, insisting that the peaceful folks accept "protective custody" violates the principle that a person may refuse life-saving intervention from the government. Furthermore,

1639. *Id.* at 111.
1640. *Id.* at 112.
1641. *Gregory*, 394 U.S. at 118.
1642. *Id.* at 121 (quoting City of Chicago v. Gregory, 223 N.E.2d 422, 429 (Ill. 1968)).
1643. Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

in practice, it may provide authorities with a ready excuse for prematurely breaking up demonstrations they dislike. All of these permutations suggest why Chief Justice Warren took the easier road of simply invalidating the statute without determining whether Gregory and his colleagues could have been convicted under an appropriately narrow statute.

If the Court did not exactly answer the questions just posed, in other cases it stressed that "clear and present danger" meant that a speaker could not be convicted of inciting others to violence unless there was an *immediate* threat to public order. One case dominates the First Amendment landscape on this point. *Brandenburg v. Ohio*,[1644] decided by an unsigned per curiam decision on June 9, 1969, was the culmination of decades of rulings and commentaries that had started with the World War I seditious speech cases. As in the early cases, the core issue was the extent to which a speaker was entitled, under the First Amendment, to advocate breaking the law.

In June 1964, a Cincinnati television station was invited by a nearby KKK group to film for broadcast a cross burning on private a farm in a rural area.[1645] Clarence Brandenburg had made the call, and he would speak in full hooded regalia at the ensuing convocation of twelve similarly adorned Klan members.[1646] As the cameras whirred to capture their flaming cross on film, some of them could be seen carrying firearms, and voices in the crowd were recorded muttering:

> 'How far is the nigger going to—yeah.'
> 'This is what we are going to do to the niggers.'
> 'A dirty nigger.'
> 'Send the Jews back to Israel.'
> 'Let's give them back to the dark garden.'
> 'Save America.'
> 'Let's go back to constitutional betterment.'
> 'Bury the niggers.'
> 'We intend to do our part.'
> 'Give us our state rights.'
> 'Freedom for the whites.'
> 'Nigger will have to fight for every inch he gets from now on.'[1647]

1644. 395 U.S. 444 (1969).
1645. *Id.* at 445.
1646. *Id.*
1647. *Id.* at 445, n.1.

Brandenburg then gave a short speech, seemingly addressing his television audience more than the robed assembly.[1648] Apparently he understood the concept of using the media for free publicity, as the tape would be broadcast locally and nationally:

> 'This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent [*sic*] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [*sic*] taken. 'We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.'[1649]

The remaining portion of the film was shot indoors, and showed Brandenburg repeating the same remarks, minus the reference to "revengeance."[1650] Adding his own perspective for the benefit of the viewing audience, Brandenburg declared, "'Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.'"[1651] Fortunately for him, that did not happen, as it would have deported much of his ACLU defense team that helped him prevail before the Court against a conviction for violating the Ohio criminal syndicalism act.

Ohio passed its statute during the first Red Scare, and the law was "quite similar" to the one upheld in *Whitney v. California*.[1652] Among other things, it proscribed advocating "the duty, necessity, or propriety" of violence to achieve political change, or assembling with others for that purpose.[1653] Convicted, Brandenburg received a sentence of one to ten years in prison.[1654] A unanimous Court reversed his conviction.[1655] Originally the case was assigned to

1648. *Id.* at 445–46.
1649. *Id.* at 446.
1650. *Id.* at 447.
1651. *Id.*
1652. *Id.* at 447 (referring to Whitney v. California, 274 U.S. 357 (1927)).
1653. *Id.* at 444–45.
1654. *Id.* at 445.
1655. *Id.*

Justice Fortas, who produced a draft opinion that was pending when he resigned suddenly on May 14, 1969 in the midst of a scandal that arose over a questionable financial arrangement he had with a figure under indictment for stock manipulation.[1656] Justice Brennan apparently revised Justice Fortas' opinion, strengthening its free-speech rhetoric.[1657] It then was issued as a per curiam decision, thereby obscuring the authorship.[1658]

Brandenburg began by reminding the Ohio courts that *Whitney* had been effectively overruled as long ago as *Dennis*.[1659] Lest there be any lingering doubt, the Court now did so explicitly.[1660] Taking pains to spell out what this meant, the opinion drew together several First Amendment strains that had originated with the seminal Holmes and Brandeis concurrence in *Whitney*:

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed to inciting* or producing *imminent lawless action* and is *likely* to incite or produce such action.[1661]

Noto was invoked for the proposition that merely teaching in the abstract the "'moral propriety'" of violence was "'not the same as preparing a group for violent action and steeling it to such action.'"[1662] Since Ohio's statute did not make that distinction, it was unconstitutionally overbroad: "It sweeps within its condemnation speech which our Constitution has immunized from governmental control."[1663]

What *Brandenburg* did *not* do was to determine whether the KKK's actions and speeches that night could have been punished

1656. Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 541–43 (2000).
1657. *Id.* at 542–43.
1658. *Id.* at 544.
1659. *Brandenburg*, 395 U.S. at 447 (referring to Dennis v. United States, 341 U.S. 494 (1951)).
1660. *Id.* at 449.
1661. *Id.* at 447 (emphasis added). *See also* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring, joined by Holmes, J.) (emphasizing that free speech should only be suppressed when there is a reasonable belief that "serious evil" will result if the speech is allowed).
1662. *Brandenburg*, 395 U.S. at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).
1663. *Id.* at 448.

under a sufficiently narrow law. Resolving those thorny questions would take another thirty years and more. That does not diminish *Brandenburg*'s pivotal place in the history of First Amendment law. According to the succinct analysis of Professor Gerald Gunther, *Brandenburg* melded "the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage."[1664] As with Hand's formulation in *Masses*, which had been picked up in *Yates*, the *Brandenburg* per curiam stressed that the words spoken must be *directed to* incitement, as opposed to conveying moral approbation or teaching the need for lawless behavior.[1665] From the clear and present danger line of cases, the requirements of imminence and likelihood were added to complete the standard. Principles and rules thus had been synthesized from prior rulings and restated in a single formula.

Brandenburg has proved to be a durable and adaptable platform for constructing the major elements of First Amendment law that emerged in the last quarter of the twentieth century. It became the standard model for analyzing two very different kinds of speech situations. One occurs, as in the facts of *Brandenburg* itself, when the speaker is accused of encouraging an audience to break the law.[1666] A second happens when the speaker's message causes some immediate harm, whether it is driving counter-demonstrators to a riotous frenzy (as in *Gregory*), causing a panic in a crowded theatre, or threatening others or offending their sensibilities (to mention a few). The televised broadcast of a blazing cross and hooded armed Klansmen making thinly-veiled threats surely would unnerve if not terrify at least some Ohio viewers, a state with a long Klan history.[1667]

The Court next confronted the immediacy issue when it reviewed a conviction in *Hess v. Indiana*,[1668] arising from a 1970 anti-war protest at the University of Indiana.[1669] Several hundred demonstrators were blocking the entrance to a university building when the police arrived and began arresting them.[1670] While the police were trying to clear the street, Gregory Hess shouted either that "'We'll take the fucking street later'" or '"We'll take the

1664. Gunther, *supra* note 580, at 754.
1665. *Brandenburg*, 395 U.S. at 447–48.
1666. *See id.* at 444–46.
1667. *Brandenburg*, 395 U.S. at 445–46.
1668. 414 U.S. 105 (1973).
1669. Hess v. State, 297 N.E.2d 413, 428 (Ind. 1973).
1670. *Hess*, 414 U.S. at 106.

fucking street again.'"[1671] For this display of verbal defiance, Hess was found guilty of disorderly conduct.[1672] He was fined one dollar.[1673] In a per curiam reversal, the Court decided that even this token penalty was unconstitutional.[1674] Responding to Indiana's argument that Hess had been trying to incite further lawlessness, the Court replied that there was no such evidence: "At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time."[1675] Ultimately, no advocacy on Hess' part had been shown. "Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action."[1676]

Fast-forward a moment to 1982, for a decision even more instructive than *Hess* regarding the immediacy requirement. The case, *NAACP v. Claiborne Hardware*,[1677] originated in 1966 when black residents of Port Gibson, Mississippi organized a boycott of white merchants to promote their campaign for racial justice. Lead by the local chapter of the NAACP, the boycott employed "watchers" who kept track of any blacks entering white stores.[1678] Those identified by the watchers had their names publicly identified in a newsletter, with the result that they were subjected to community ostracism, and in some cases violence.[1679] Boycott participants also held meetings, gave speeches, and picketed targeted businesses.[1680] Retaliating, seventeen local merchants sued the NAACP and over 140 individuals who had participated in the boycott, alleging that the action was an illegal conspiracy designed to harm their businesses.[1681] Plaintiffs won a nearly complete victory at trial, receiving over a million dollars in damages and gaining a permanent injunction against the boycott.[1682] Every defendant was held personally liable for the entire judgment, which was calculated

1671. *Id.* at 107.
1672. *Id.* at 105.
1673. *Hess*, 297 N.E.2d at 428.
1674. *Hess*, 414 U.S. at 109.
1675. *Id.* at 108.
1676. *Id.* at 108–09.
1677. 458 U.S. 886 (1982).
1678. *Id.* at 887.
1679. *Id.* at 903–04.
1680. *Id.* at 886.
1681. *Id.* at 889–90.
1682. *See id.* at 893.

to award the stores every penny of lost profits over a seven-year period. The trial court agreed that between 1966 and 1970 the boycott had created an "atmosphere of fear" in the black community, although no acts of violence were recorded after the first year.[1683] Much of the plaintiffs' case rested on statements made at meetings by Charles Evers, the Field Secretary of the NAACP in Mississippi. Evers had warned blacks in the community that they would face "discipline" if they patronized white stores.[1684] "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[1685]

A unanimous Court reversed the judgment.[1686] Much was at stake—the boycott had been an effective weapon against segregation since the Montgomery bus boycott inspired by Rosa Parks' arrest in 1955. Justice Stevens' opinion steered down a tight path to reach this result, constrained as he was by two rather different lines of precedent. To start, there was an inviolable rule: "The First Amendment does not protect violence."[1687] That is, one cannot engage in violence and claim that it is a form of expression immunized from punishment by the First Amendment. There was no denying that acts of violence, including gunfire, had been directed against some blacks who ignored the boycott.[1688] Evers' speeches, which were full of pleas for solidarity and innuendos of social ostracism for those who broke their pledge to avoid white stores, "implicitly conveyed a sterner message" than the Court could countenance.[1689] The other constraint came from the traditional reluctance to extend First Amendment protection to secondary boycotts, which the Port Gibson action amounted to, as some blacks otherwise willing to shop at the white stores were admonished not to do so.[1690] Many of the NAACP's demands were unrelated to the businesses themselves, as in the call for school integration, improvements to public services in black residential areas, an end to segregated bus stations, a stop to verbal abuse by police, and so on.[1691] In labor disputes, a union cannot even picket

1683. *Id.* at 904.
1684. *Id.* at 902.
1685. *Id.*
1686. *Id.* at 934 (Justice Rehnquist concurred in the result).
1687. *Id.* at 916.
1688. *See id.*
1689. *Id.* at 927.
1690. *Id.* at 892.
1691. *See id.* at 899.

a business with which it does not have a primary grievance.[1692] Moreover, businesses are not allowed by antitrust laws, which are unquestionably constitutional, to engage in conspiracies to suppress competition.[1693]

Before Stevens could deal with Evers' speech and the various violent acts tied to the boycott, he first needed to sustain the collective refusal to deal with local businesses as a form of expression and association secured by the First Amendment. He gave a straightforward answer: there was a difference between engaging in a boycott as an "economic activity"—a labor strike being the paradigm example—and doing so as "political activity."[1694] "This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"[1695] Stevens invoked an earlier case to explain why: "Speech concerning public affairs is more than self-expression; it is the essence of self-government."[1696] States could not penalize "a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[1697] Associating with others for that purpose was protected behavior, as were the speeches and marches in support of the boycott.[1698] As for coercing people to obey the boycott through social disapproval, that was fully covered by the First Amendment.[1699] It was a form of persuasion, "constitutionally protected and beyond the reach of a damages award."[1700] "Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."[1701] Also protected was the effort to influence the businesses.[1702] This was not "fundamentally different from the function of a newspaper."[1703]

1692. *Id.* at 912.
1693. *Id.*
1694. *Id.* at 913.
1695. *Id.* (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).
1696. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).
1697. *Id.* at 914.
1698. *Id.* at 909.
1699. *Id.* at 909–10.
1700. *Id.* at 926.
1701. *Id.* at 910.
1702. *See id.* at 914.
1703. *Id.* at 911 (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971)).

But what about the violence? And Evers' threat to break necks? On the former, Stevens put the incidents in context. They were "isolated acts" that took place in the first year of the boycott, whereas the Mississippi courts had ordered the defendants to pay damages equal to "*all* business losses sustained over a [seven]-year span."[1704] Regarding Evers' speeches, Stevens emphasized the big picture—that his "lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them."[1705] While "strong language" had been used, this was unexceptional: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause."[1706] Whatever acts of violence occurred, with one possible exception, they took place weeks or months after the speeches given at the start of the boycott in 1966.[1707] Considering that the boycott's "ultimate objectives were unquestionably legitimate," and that most of the means used likewise were protected by the First Amendment, liability for the few acts of violence depended on proving a specific link between them and the plaintiffs' economic losses.[1708] "A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts."[1709]

Regarding Evers' regrettable neck-breaking reference, which took place in 1969, no violence had erupted as a result.[1710] Drawing on cases dealing with Communist organizations, Stevens ruled out imposing liability on those who participated in the NAACP's effort, even assuming that Evers' warning was outside the First Amendment's shield: "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[1711] Evers' "threat," however, fell

1704. *Id.* at 924 (emphasis added).
1705. *Id.* at 928.
1706. *Id.*
1707. *Id.*
1708. *Id.* at 933.
1709. *Id.*
1710. *Id.* at 928.
1711. *Id.* at 920.

within the First Amendment's ambit, as they had to be taken in context of a lengthy campaign to encourage Port Gibson blacks to remain united.[1712] So long as the "appeals do not incite lawless action, they must be regarded as protected speech."[1713]

That last line was extraordinarily important to the evolution of the First Amendment. To punish a speaker for inciting a crowd, there must not only be an imminent danger, but also the failure of any harm to materialize; it conclusively established that there had been no immediate harm threatened by the speech.[1714] Combined with that, earlier speech decisions had refused to uphold convictions based on predictions of violence by authorities. When the aim of the speaker is legitimate (e.g., political change), rather than being part of a scheme to accomplish illicit ends (e.g., a bank robbery), the burden on authorities to impose penalties for nonviolent expression is nearly insurmountable.

Justice Fortas' draft opinion in *Brandenburg* was circulated to the other Justices on April 21, 1969, the same day the Court decided *Watts v. United States*[1715] and *Street v. New York*.[1716] Both of these decisions were issued a little more than a month after *Gregory*. In late February, the Court had issued its judgment in another First Amendment case, *Tinker v. Des Moines School District*.[1717] These cases showed that the Court was already dealing with the implications of *Brandenburg*, even before the opinion in the case was handed down.

Tinker started in December 1965, when the principals of the Des Moines, Iowa schools adopted a new rule outlawing the wearing of armbands at school, on penalty of suspension.[1718] Anti-gang measure? No, it was in response to information they had received about plans by some students to wear black armbands to school for the remainder of the calendar year in protest of the Vietnam War and in support of a truce.[1719] Kids from junior-high age to high school deliberately defied the ban and were suspended accordingly.[1720] Theirs was but one small protest in a year-long escalation of both the war and demonstrations both for and against

1712. *Id.* at 928.
1713. *Id.*
1714. *See* NAACP v. Claiborne Hardware Co. 458 U.S. 886 (1982).
1715. 394 U.S. 705 (1969).
1716. 394 U.S. 576 (1969).
1717. 393 U.S. 503 (1969).
1718. *Id.* at 504.
1719. *Id.*
1720. *Id.*

American involvement. The year was a turning point in America's commitment to prevent South Vietnam from being absorbed by its Communist twin to the north. American combat troops had entered Vietnam in March of that year for the first time, supplementing over 20,000 U.S. "advisors" already in the country and ongoing air strikes by American forces; in July, President Johnson ordered the number of troops increased to 125,000. American soldiers and airmen became involved in fierce fights with the Viet Cong and the North Vietnamese army. Hundreds of U.S. soldiers had by then died or been seriously wounded in combat. On November 27, tens of thousands of anti-war marchers circled the White House in protest. Ten days earlier, 155 American soldiers from the First Cavalry Division were killed in a firefight; the next day the Cavalry killed 869 of the enemy. By the end of December, troop levels had climbed above 180,000.[1721] A few days later, the Des Moines students returned to class without armbands.[1722] Three years then would pass before their suspensions were held by the Court to violate the First Amendment.

Justice Fortas was assigned the task of writing the Court's opinion in *Tinker*, which would be one of his very last and the most influential he wrote as a Justice. Fortas was an intriguing choice for the assignment. It was widely known that he had continued to advise President Johnson after taking his seat on the Court, and that the Justice was a vigorous supporter of the war. Personally, he held no fond feelings for war opponents, nor was he supportive of demonstrations that broke laws. Here, however, there were no group demonstrations, no "aggressive" behavior, and no "disruptive action" by anyone.[1723] "It was closely akin to 'pure speech,' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment," Fortas wrote.[1724] "Pure speech" was a term that Justice Goldberg had introduced in *Cox*. It meant any form of expression that did not involve conduct, although "conduct" might be stretched to include acts such as handbilling that involve distributing papers.[1725] According to *Cox*, pure speech does *not* include "patrolling, marching, and picketing on streets

1721. *See* STANLEY KARNOW, VIETNAM: A HISTORY 435–484 (1983).
1722. *Tinker*, 393 U.S. at 504.
1723. *Id.* at 508.
1724. *Id.* at 505–06.
1725. Cox v. Louisiana, 379 U.S. 536, 555 (1965).

and highways."[1726] Armbands were sort of quasi-pure, somewhere between picketing and the spoken or written word. As Goldberg had done, Fortas afforded greater protection to pure speech than expression that involved conduct. Neither explained why, and there is no good reason to rely on the distinction—pure speech can have deadly results, whereas communicative actions may be harmless. The Court itself has not stuck to a rigid formula for defining pure speech. A 1980 decision, for example, referred to "[p]ublic-issue picketing" as "expressive conduct," while going on to characterize it as "an exercise of . . . basic constitutional rights in their most pristine and classic form," placing it "on the highest rung of the hierarchy of First Amendment values."[1727] Pure speech in the sense of spoken or written words can produce violent upheavals or infamous libels, which is why incitement to immediate violence is unprotected and defamation suits are common. Sexual harassment in the workplace violates federal civil right laws, and is outside the First Amendment even if carried out purely by words.[1728] If there is any point to the distinction between pure speech and speech involving actions, it is that expressive conduct tends to provoke more reasons for public regulation than pure speech, though not always. When certain forms of action are involved, typically with public demonstrations, the authorities may impose restrictions, such as parade permits, that could not apply to pure speech in the sense that *Cox* used the term.[1729]

If *Tinker* had arisen because the City of Des Moines banned the wearing of black armbands by any person in public, the law certainly would have been unconstitutional. As this was a rule for students only, the First Amendment had to be "applied in light of the special characteristics of the school environment."[1730] A student's action need not be tolerated when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[1731] Students (and teachers), nonetheless, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Fortas wrote, noting that in *Barnette* the Court had invalidated compulsory flag salutes in schools as

1726. *Id.*
1727. Carey v. Brown, 447 U.S. 455, 466 (1980).
1728. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
1729. *Cox*, 379 U.S. at 555.
1730. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
1731. *Id.* at 513.

infringing on First Amendment rights.[1732] School authorities could bar disruptive or harmful behavior, but nothing like the symbolic protest in *Tinker*. Wearing the armbands was a "silent, passive expression of opinion,"[1733] which "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder."[1734] By their own admission, the principals had imposed the ban out of "fear of a disturbance from the wearing of the armbands."[1735] That would not do, Justice Fortas admonished, because "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[1736] Besides, there would be no stopping point if officials could ban speech whenever they forecast disorder: "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear."[1737] Public schools could not be "enclaves of totalitarianism," nor were students to "be regarded as closed-circuit recipients of only that which the State chooses to communicate."[1738] One danger of extending unbridled control to school principals was the real possibility of discrimination against the ideas being communicated by the speech. In Des Moines schools, for example, students were not punished for sporting political buttons promoting candidates for public office.[1739] Students also were known to wear "the Iron Cross, traditionally a symbol of Nazism."[1740] (Cultural note: wearing an Iron Cross in the 1960s often signaled an aspiration to be a Surfer Dude, not a Nazi, and no doubt some Iowa kids were California Dreamin'.)[1741]

Tinker did not lay the foundation of broad speech rights for students. Justice Fortas may have extolled the classroom as "peculiarly the 'marketplace of ideas,'" but there was a limit.[1742] Student expression must be carried out "without 'materially and

1732. *Id.* at 506–07.
1733. *Id.* at 508.
1734. *Id.* at 514.
1735. *Id.* at 508.
1736. *Id.*
1737. *Id.*
1738. *Id.* at 511.
1739. *Id.* at 510.
1740. *Id.*
1741. The cultural note is based on the author's personal observation and youthful aspirations.
1742. *Id.* at 512 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.'"[1743] Later cases would emphasize the substantial discretion that school officials needed in determining when these conditions were present.[1744] A primary function of public schools, Justice Powell wrote in 1969, was "inculcating fundamental values necessary to the maintenance of a democratic political system."[1745] Those values, Chief Justice Burger subsequently elaborated, included the "habits and manners of civility."[1746] Thus, a speech by a high school student, during an assembly, that used sexual innuendos could be punished because "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."[1747] Undoubtedly principals could order a student to remove a sweatshirt inscribed with profanities, or send a kid home until he removed a Klan robe. School newspapers written by students were subject to censorship, provided doing so was "reasonably related to legitimate pedagogical concerns."[1748]

In other words, context, along with nature of the communication itself, were key considerations in evaluating speech rights. Take the case of Robert Watts. While attending an anti-war rally at the Washington Monument in 1966, he announced to a small group that he had been ordered to appear for a military draft physical the following Monday.[1749] "I am not going," he told the others.[1750] Making "a gesture as if sighting down the barrel of a rifle,"[1751] Watts declared that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers."[1752] Laughter and applause

1743. *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
1744. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
1745. Ambach v. Norwick, 441 U.S. 68, 77 (1968).
1746. *Fraser*, 478 U.S.at 681.
1747. *Id.* at 683.
1748. *Kuhlmeier*, 484 U.S. at 273.
1749. Watts v. United States, 394 U.S. 705, 706 (1969).
1750. *Id.*
1751. Watts v. United States, 402 F.2d 676, 681 (D.C. Cir. 1968). Unfortunately for Watts, an Army Counter Intelligence Corps agent just happened to be listening. *Id.*
1752. *Watts*, 394 U.S. at 706.

greeted his remarks.[1753] Watts was arrested by the Secret Service and convicted of knowingly threatening the President—a felony—for which he was placed on four years' probation.[1754] In a per curiam opinion, the Court reversed without hearing oral argument,[1755] overturning an appellate ruling by Judge (and soon to be Chief Justice) Warren E. Burger, who thought that Watt's "words, considered in context, reasonably permit an inference that he was uttering a threat."[1756]

Judge Burger was right in one respect, the Court agreed in reviewing the conviction, context was critical.[1757] But the majority perceived the context far differently than Burger had. On its face, the statute was unobjectionable—the nation had an overwhelming interest in protecting its chief executive from threats of violence.[1758] Regardless, the statute had to be "interpreted with the commands of the First Amendment clearly in mind."[1759] Doing so, the Court characterized Watts' utterance as "political hyperbole" that Congress could not have meant to punish since presumably it knew that the First Amendment allowed "uninhibited, robust, and wide open" debate that included "unpleasantly sharp attacks" on officials.[1760] Watts was exercising pure political speech, not announcing a true assassination plan.[1761]

> We agree with [Watts] that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.[1762] Within a few years, people might call it performance art. Watts was ordered acquitted.[1763]

Street v. New York[1764] presented the Court with its first opportunity to consider whether burning the American Flag

1753. *Watts*, 402 F.2d at 681.
1754. *Id.* at 677.
1755. *Watts*, 394 U.S. at 708.
1756. *Watts*, 402 F.2d at 681.
1757. *See Watts*, 394 U.S. at 708.
1758. *Id.* at 707.
1759. *Id.*
1760. *Id.* at 708 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
1761. *See id.* at 708.
1762. *Id.*
1763. *Id.*
1764. 394 U.S. 576, 578 (1969).

constituted a form of protected speech. Sidney Street was listening to the radio in his Brooklyn apartment on the afternoon in 1966 that the civil rights leader James Meredith was assassinated in Mississippi.[1765] Hearing the news, Street became enraged, grabbed his own American flag and proceeded to a street corner nearby, where he lit the flag on fire and dropped it to the pavement.[1766] Some thirty people gathered around him, and a police officer overheard Street say, "We don't need no damn flag."[1767] When asked by the officer if he had burned the flag, Street replied that he certainly had, explaining, "[i]f they let that happen to Meredith we don't need an American flag."[1768] Street was convicted under a New York law that made it a misdemeanor "publicly (to) mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act (any flag of the United States)."[1769] Justice Harlan's majority opinion avoided the land mine issue of whether the First Amendment protected the burning of the flag in protest.[1770] Instead, he grasped onto the possibility that the trial court had convicted Street for using "words" to "cast contempt upon" the flag.[1771] That, New York could not do.[1772] Freedom of speech in an "intellectually diverse" country included the right to express "opinions which are defiant or contemptuous."[1773] He repeated Justice Jackson's admonition from the flag salute case, that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[1774] Street's short speech "amounted only to somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols."[1775] It is clear that the Fourteenth Amendment prohibits the States from imposing

1765. *Id.*
1766. *Id.*
1767. *Id.* at 578–79.
1768. *Id.* at 579.
1769. *Id.* at 578.
1770. *See id.* at 577–94.
1771. *Id.* at 590.
1772. *Id.* at 591.
1773. *Id.* at 593.
1774. *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
1775. *Id.* at 591. *See also* Bachellar v. Maryland, 397 U.S. 564, 564–65, 569–71 (1970) (setting aside defendants' disorderly conduct convictions for engaging in an illegal sit-in at a military recruitment center, because the jury instructions allowed a guilty verdict "simply because they advocated unpopular ideas.").

criminal punishment for public advocacy of peaceful change in our institutions.[1776]

It was entirely possible that Street's speech, when combined with the flag burning, caused offense to some observers at the scene.[1777] No evidence of that was presented, though at other times and places Street might have been in mortal danger.[1778] Whether true or not, this made no difference, since "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[1779] Harlan had crystallized *Cox*, *Edwards*, *Terminiello*, and *Cantwell* into a firm rule,[1780] and in so doing he bridged the diverse settings of *Gregory* and *Brandenburg*. Offending others could not be punished consistent with the First Amendment, no matter how loathsome the remarks that justified the offense taken.[1781] It would be otherwise if Street had used fighting words.[1782] He had not, Harlan held, since his remarks were not "so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation.'"[1783] He did not venture why. Possibly it was because Street had not berated or confronted anyone in particular and instead made a political statement. Insults to someone else's political beliefs are not fighting words, all appearances to the contrary.[1784]

That the First Amendment grants a person the right to offend others may strike some as the last nail in the coffin of Western Civilization. Yet what offends one may be another's heartfelt political or moral conviction. Consider the illuminating case of *Cohen v. California*,[1785] decided in 1971, with Justice Harlan writing a sterling defense of the right to public vulgarity.[1786] Issued on June 7, 1971, *Cohen* was Harlan's last major opinion and possibly his finest. Harlan retired on September 23, and, suffering from

1776. *Street*, 394 U.S. at 591.
1777. *See id.* at 592.
1778. *Cf. id.* (discussing violent retaliation but surmising Street's words were not so inflammatory as to provoke an average person to retaliate or cause a breach of the peace).
1779. *Id.*
1780. *See id.* at 591–94.
1781. *Id.* at 594.
1782. *See id.* at 592.
1783. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).
1784. *See id.*
1785. 403 U.S. 15 (1971).
1786. *Id.* at 21–26 (1971).

cancer, died on December 29 of that year. He was nearly blind while writing the decision.

The case started quietly in 1968 when Robert Paul Cohen was standing in the public corridor outside a courtroom in Los Angeles.[1787] He wore a jacket bearing the words, "Fuck the Draft," which he later testified was intended to publicize his views about the Vietnam War and conscription.[1788] No one complained (it was LA in 1968!), but Cohen was convicted of disturbing the peace and sentenced to thirty days in jail.[1789] A California appellate court affirmed, reasoning that "the defendant deliberately wore a jacket emblazoned with language which is clearly offensive and below the 'minimum standard of propriety and the accepted norm of public behavior' at least when paraded through a courthouse corridor containing women and children."[1790] To make it worse, Cohen had meant to be provocative: "He carefully chose the forum for his views where his conduct would have an effective shock impact. The defendant's stated purpose was to force a confrontation with others as to his opinion of the draft."[1791] Unquestionably, the court concluded, Cohen "must have been aware that his behavior would vex and annoy a substantial portion of his unwilling 'audience.'"[1792] (Keep in mind that the "f-word" had not yet achieved ubiquity in American discourse, and no doubt some men as well as women might have taken offense, or not have wanted their children to see it.)

Justice Harlan's methodology in attacking these arguments was not entirely new, but it laid out a systematic approach to regulations of speech content that would serve as a model for future decisions. Every step in his reasoning flowed from an axiom: the "usual rule" was "that governmental bodies may not prescribe the form or content of individual expression."[1793] Free expression was the default position, the status quo, the baseline of speech rights; departure from it required the state to prove a

1787. *Id.* at 16.
1788. *Id.*
1789. *Id.* at 16–17.
1790. People v. Cohen, 81 Cal. Rptr. 503, 506 (Ct. App. 1969) (quoting Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463, 472 (1967)), *rev'd*, 403 U.S. 15 (1971).
1791. *Id.*
1792. *Id.*
1793. Cohen v. California, 403 U.S. 15, 24 (1971).

"particularized and compelling reason."[1794] A "usual rule" implies that there are exceptions, and there were categories of allowable state regulations on the content of speech—all of which were long regarded as beyond First Amendment protection.[1795] Justice Harlan methodically dismissed every possibility of such.[1796] Here, the state's case was all the more difficult to win since the prosecution punished a form of pure speech, and not "any separately identifiable conduct."[1797] That greatly lessened the reasons the state might validly have had for penalizing the expressive activity. No category of exceptions recognized by the Court allowed regulation of speech solely because the state disagreed with "the underlying content of the message" conveyed by the jacket's three words.[1798] However crude, they undeniably conveyed a political view.[1799] It followed that punishing Cohen could "be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom."[1800]

Justice Harlan then marched through all of the possible exceptions that might apply to validate Cohen's conviction.[1801] "Fuck the Draft" did not qualify as unprotected obscenity, which must at a minimum "be, in some significant way, erotic," and Cohen's choice of words was unlikely to "conjure up such psychic stimulation."[1802] So declared a strait-laced, seventy-two-year-old former Wall Street lawyer. Nor had Cohen used fighting words, because "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[1803] That one line limited the exception for fighting words to a narrow category of "in-your-face" personal insults. Next, Cohen could not be said to have incited violence by "intentionally provoking a given group to hostile reaction."[1804] This was no *Feiner*, or even the situation in *Terminiello*.[1805] Then Justice

1794. *Id.* at 26.
1795. *See id.* at 24.
1796. *See id.* at 19–21.
1797. *Id.* at 18.
1798. *Id.*
1799. *See id.*
1800. *Id.* at 19.
1801. *See id.* at 19–21.
1802. *Id.* at 20.
1803. *Id.*
1804. *Id.*
1805. *See supra* notes 1090–1105 and accompanying text; *see also supra* notes 1027–1043 and accompanying text.

Harlan came to the most delicate portion of the opinion: the question of offense.[1806] California contended that his vulgar expression "was thrust upon unwilling or unsuspecting viewers,"[1807] which it very likely had. In reply, Justice Harlan drew one of the most significant distinctions to emerge in free speech law: Government was entitled to stop "intrusion into the privacy of the home of unwelcome views and ideas," even though such offensive messages "cannot be totally banned from the public dialogue."[1808] Outside the home was totally different. Justice Harlan quoted Chief Justice Burger, who had written the previous year, "'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.'"[1809] (Chief Justice Burger dissented in *Cohen*.) Cohen's "crudely defaced jacket"[1810] was nothing like a blaring sound-truck; anyone spotting the message "could effectively avoid further bombardment of their sensibilities simply by *averting their eyes*."[1811] Although some might have been "briefly exposed" before looking away, that alone could not amount to a "breach of the peace."[1812]

That left only one possibility: that California was entitled to "excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse," either because the word was "inherently likely to cause violent reaction," or because the state, "acting as [a] guardian[] of public morality," had declared it forbidden.[1813] Government could not proceed on either premise, *Cohen* concluded.[1814] Recalling *Tinker*, Harlan rejected the idea that speech could be suppressed out of an "'undifferentiated fear or apprehension of disturbance.'"[1815] Suppressing expression to prevent an assault on the speaker was a "self-defeating proposition," as it only substituted the state as a censor in place of the "hypothetical coterie of the violent and lawless" wishing to silence

1806. *See Cohen*, 403 U.S. at 18.
1807. *Id.* at 21.
1808. *Id.*
1809. *Id.* at 21 (quoting Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970)).
1810. *Id.* at 20.
1811. *Id.* at 21 (emphasis added).
1812. *Id.* at 22.
1813. *Id.*
1814. *Id.* at 23–26.
1815. *Id.* at 23 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

those who offend them.[1816] Embodied in Harlan's argument was the assumption that government must tolerate "verbal tumult, discord, and even offensive utterance" as "necessary side effects" of free debate.[1817] "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength," as the discord signified vitality and commitment to self-rule.[1818]

Harlan's line of reasoning struck Justice Blackmun, who was completing his first year on the Court, as hot air.[1819] "Cohen's absurd and immature antic, in my view, was mainly conduct and little speech," he wrote testily.[1820] In this spirit, one might reasonably ask why society cannot insist on civility in public discourse, and since any argument can be made without using "fuck" or its cognates, why not oblige people to choose a less offensive vehicle for expressing their ideas in public? That line of thinking led Harlan to introduce a critical element to First Amendment analysis. Excising "one particular scurrilous epithet" from the lexicon of acceptable words for public discourse would countenance the suppression of other expressions the government deemed beyond the pale of civil discourse.[1821] And how would a court determine if the suppression was justified in the name of community values? "How is one to distinguish this from any other offensive word?"[1822] Harlan could discern no principle for deciding, short of giving government the authority "to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[1823] The state could do nothing of the sort. "For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."[1824] Precisely because the government could not "make principled distinctions in this area," Harlan emphasized, "the Constitution leaves matters of taste and style" largely to the individual.[1825] He might have added that it would be a futile effort

1816. *Id.*
1817. *Id.* at 24–25.
1818. *Id.* at 25.
1819. *See id.* at 27–28 (Blackmun, J., dissenting).
1820. *Id.* at 27.
1821. *Id.* at 22.
1822. *Id.* at 25.
1823. *Id.*
1824. *Id.*
1825. *Id.*

in any event, since language is malleable enough that people can always come up with some new word or phrase just as offensive as Cohen's, especially if they are goaded by a ban on their usual epithets.

Harlan closed his opinion with a trenchant observation that "words are often chosen as much for their emotive as their cognitive force," which reflected the "dual communicative function" of language: "it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."[1826] If this seems implausible, try an experiment: come up with another expression that would have equally well served Cohen's purpose of publicizing his vehement opposition to the war. Something along the lines of "Down with the Draft" or "Heck no, I won't go" fails to capture the same depth of bitter resentment that Cohen's invective imparted. If government "can forbid particular words," there was "a substantial risk of suppressing ideas in the process," Harlan warned.[1827] Giving the state such license could become "a convenient guise for banning the expression of unpopular views."[1828]

"The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours," Harlan commented in *Cohen*, summarizing in one sentence much of the nation's experience during the 1960s.[1829] Like a pill, speech could help cure social ills. It also could have nasty side effects, and like many a patient swallowing a bitter tonic, Americans needed to keep the ultimate benefits in mind while they endured the remedy. Freeing the voices of the populace places

> the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[1830]

1826. *Id.* at 26.
1827. *Id.*
1828. *Id.*
1829. *Id.* at 24.
1830. *Id.*

VI. THE FOUNDATIONS OF FREE EXPRESSION ESTABLISHED

Reviewing the entire development of the First Amendment from its origin to the early 1970s, the striking fact is that almost everything about constitutional protections for free expression and association was fundamentally changed in this period. All of the foundational changes took place in the relatively brief period from the 1930s to the early 1970s. Along with crucial fluctuations in the specific rules relating to speech and press rights, the Court moved from an attitude that was extremely accepting of governmental repression to a model of overall tolerance for expression and personal association with others. At the beginning of the last century, the Court remained entrenched in Blackstone's world, in which the only limitations on governmental power over speech and press related to prior restraints. A hundred years later, it had adopted the view of Holmes' *Abrams* dissent, that "[t]he hallmark of the protection of free speech is to allow 'free trade in ideas.'"[1831] By the 1970s, any governmental impingement on the content of political expression was highly suspect. Relatedly, the Court declared that the First Amendment's right of expression implies "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[1832] Furthermore, whereas a century ago public employees could be forced to choose between their jobs and speaking their minds on public affairs, today government workers enjoy a large measure of freedom to engage in expression. During the same period, the Court went from giving government complete discretion over speech activities on public property, thereby allowing officials to exclude speakers at their whim, to recognizing that people have a right to use the streets, squares and parks and other public premises for expressive purposes.

All of these are qualified rights, subject to various exceptions. Nevertheless, it is unmistakable that in the span of less than fifty years, First Amendment analysis acquired a distinctively libertarian tone. Not just libertarian in preventing the government from suppressing most expression, but more importantly in its premise that liberty of speech is the normal or baseline condition of American society, and departures from that baseline by the state

1831. Virginia v. Black, 538 U.S. 343, 358 (2003) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

1832. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

require strong justifications. Furthermore, the First Amendment is understood to guard the interests of both the speaker in disseminating information and the listener in receiving it. Put more broadly, there is an "informational purpose of the First Amendment,"[1833] Justice Powell wrote for the Court, which recognized that regardless of its source, "expression may contribute to society's edification."[1834] Government could not discriminate against either the source or, except in narrow and specifically-defined instances, the content of speech.[1835] "This right to receive information and ideas, regardless of their social worth," the Court held in 1969, "is fundamental to our free society."[1836]

A First Amendment inquiry after the early 1970s begins by asking whether a law restricts communication or association in some way. Analytically, there are six basic scenarios in which the government may justify such restrictions under the Court's decisions. First, the law might directly suppress the content of a person's speech or associations—that is, limit what message an individual can communicate or dictate with whom the person may associate.[1837] For example, a statute might outlaw obscene books and movies, or require a private club to admit women or minorities as members contrary to the wishes of the group. Second, a statute on its face could have nothing to do with speech (such as an ordinary criminal law), but enforcement of the law might impinge on expression or association.[1838] The law against burning a draft card that was upheld in *United States v. O'Brien* was one such general

1833. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 782 n.18 (1978).

1834. *Id.* at 783.

1835. *Id.* at 783–84.

1836. Stanley v. Georgia, 394 U.S. 557, 564 (1969). *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (discussing the right to receive information as including public access to criminal trials); *Bellotti*, 435 U.S. at 783 (discussing First Amendment protection for "public access to discussion, debate, and the dissemination of information and ideas"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (holding that minors have same rights to receive information has adults except "in relatively narrow and well-defined circumstances"); Kleindienst v. Mandel, 408 U.S. 753, 762–763 (1972) (acknowledging that First Amendment protects the right to "receive information and ideas"); Lamont v. Postmaster Gen., 381 U.S. 301, 305–07 (1965) (recognizing right to receive political publications sent from foreign countries).

1837. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) (subjecting content-based regulations of speech to strict scrutiny).

1838. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, (1984) (upholding regulation against sleeping in park despite its impact on speakers' choice of forum).

law that incidentally affected expression.[1839] Third, a law could regulate speech or association not through banning the content, but by restricting the time, place and manner of these activities, such as requiring parade permits, limiting the decibel levels of sound trucks or obliging political candidates to report the names of their contributors.[1840] Fourth, the state may be attempting to control access to public property, for example by banning demonstrations inside of government office buildings.[1841] Fifth, it may be attempting to curb a government employee's speech, such as when a public school teacher is fired for complaining about how the school board is spending education funds.[1842] Sixth, as a condition for receiving a government grant, the recipient of the funds may be obligated to curtail what otherwise would be First Amendment rights.[1843] An instance of this occurred when recipients of federal funds for family planning were required not to counsel patients regarding abortions.[1844]

Each of these possibilities is tested according to a different standard. For all of them, however, there is a principle "that underlies the First Amendment itself,"[1845] namely neutrality on the part of government toward the viewpoint of speakers.[1846] To recall again Justice Jackson's declaration in the 1943 flag salute case, the "fixed star in our constitutional constellation" consists of refusing to allow officials, whether "high or petty," from dictating "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

1839. United States v. O'Brien, 391 U.S. 367 (1968).

1840. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147 (1939) (recognizing legitimacy of reasonable time, place and manner rules, but striking down a total ban of handbilling).

1841. *See, e.g.*, Cameron v. Johnson, 390 U.S. 611, 617 (1968) (holding that the prohibition of conduct that obstructs or unreasonably interferes with ingress or egress to or from courthouse does not abridge free speech rights).

1842. *See, e.g.*, Pickering v. Bd. of Ed., 391 U.S. 563, 574 (1968) (holding that "absent proof of false statements knowingly or recklessly made by [a teacher], a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

1843. Rust v. Sullivan, 500 U.S. 173, 192–200 (1991) (determining that regulations do not violate First Amendment free speech rights of federal fund recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies).

1844. *Id.*

1845. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 (1984).

1846. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 220–21 (2000). *See also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 67 (1976) (Stevens, J., plurality opinion).

therein."[1847] Over time, the Court restated Jackson's principle in the form of a basic rule, that "government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."[1848] On occasion, the government can restrict the content of speech, as when it prohibits a person from threatening another with violence. But while it may limit an entire category of speech (such as threatening words) it must do so across the board, without regard to the viewpoint of the speaker. A ban on all true threats would be constitutional, but not a law that forbids threatening someone who supports the President's national security policies. The only nuance that must be added to Jackson's statement occurs with regard to the sixth scenario just outlined—conditions on funding. To a great extent, government can distribute government funds in a manner that prefers certain viewpoints to others, as the abortion limitation proves.

The principle of government neutrality regarding expression did not blow in from the desert. Rather, it encapsulates an attitude about the relationship between citizen and state that grew out of the specific historical events covered in this essay. Not uncommonly, the Court's endorsement of First Amendment rights arose in tandem with, or was preceded by, other constitutional developments. From the 1930s to the 1960s, for instance, the Court was presented with an assortment of cases in which individuals were arrested for literally doing nothing other than expressing an unpopular view, or sometimes for simply being in a place that authorities deemed off limits to those who bucked the established order. To resolve these controversies, the Court relied on another libertarian premise—that Americans cannot be deprived of their liberty or property unless they violate a law applicable to everyone. Moreover, people are entitled to be in public places, move about the country, and associate with whom they wish, regardless of whether society disapproves. All of these rights—and many more—assume that for a broad swath of human behavior the normal order of affairs is personal autonomy, not state control.

1847. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
1848. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).